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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND

OTHER COURTS.

With Tables of the Cases and Principal Matters.

By PEREGRINE BINGHAM,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

VOL. VI.

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The Right Hon. Sir NICHOLAS CONYNGHAM TINDAL, Knt. Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir STEPHEN GASELEE, Knt.

Hon. Sir JOHN BERNARD BOSANQUET, Knt.

A

TABLE

OF THE

NAMES OF CASES

REPORTED IN THIS VOLUME.

A

	Page
ADAM, Wood *v.*	481
Adams *v.* Bateson	110
——— *v.* Dansey	506
——— *v.* Gibney	656
Adcock *v.* Felton	441
Addis *v.* Thomas	236
Afflalo v. Fourdrinier	306
Alcock v. Cook	733
Armstrong, Newbury *v.*	201
Ash and Wife and Watts, Conusors; Gye, Conusee	275
Ashworth *v.* Heathcote	596

B

Baily, Cumming *v.*	363
Barling *v.* Waters	423
Barwise, M'Crandle *v.*	429
Bateson, Adams *v.*	110
Beavan *v.* Dawson	566
Begbie, Mitchenson *v.*	190
Belshaw, Chalie *v.*	529
Bennett, Edwards *v.*	230
Bernard, Ford *v.*	534
Bernasconi, Chambers *v.*	498
Bishop of Chester, Fox *v.*	1
——— Shepherd *v.*	435
Blogg *v.* Kent	614
Booth *v.* Middlecoat	445
Bousfield, Womersley *v.*	801
Boweren, Grymes *v.*	437
Brenton, Doe d. Carthew *v.*	469
Breton, Carter *v.*	617
Brett, Hughes *v.*	239
Briggs *v.* Sharp	517
Brooks, French *v.*	354
Burgesses of Lyme Regis, Henley *v.*	195
Buszard, Capel *v.*	150

C

Campbell, Smith *v.*	637
Capel *v.* Buszard	150
Carter *v.* Breton	617
Cattle, Mills *v.*	743

	Page
Chalié *v.* Belshaw	529
Chambers *v.* Bernasconi	498
Chapman *v.* Prickett	602
Charles, Foster *v.*	396
Charleton *v.* Morris	427
Charrington *v.* Laing	242
Chatterton, Towler *v.*	258
Clarkson *v.* Lawson	266. 587
Clifton, Fox *v.*	776
Cockburn *v.* Ling	732
Collett, Mills *v.*	85
Cook *v.* Ward	409
—— Alcock *v.*	733
Cooke, Doe d. Hammond *v.*	174
Craven *v.* Edmondson	734
Cuming *v.* Welsford	502
Cumming *v.* Baily	363
Curling *v.* Shuttleworth	121

D

Dalton, Godefroy *v.*	460
Dance *v.* Wyatt	486
Dansey, Adams *v.*	506
Davis *v.* Garrett	716
Dawson, Beavan *v.*	566
Day *v.* Stuart	109
Delafield *v.* Freeman	294
Denn d. Nowell *v.* Roake	475
Dent, Topham *v.*	515
Dicas *v.* Jay	519
Dickson, Russell *v.*	442
Dobinson, Philpott *v.*	104
Doe d. Campbell *v.* Scott	362
——— Carthew *v.* Brenton	469
——— Hammond *v.* Cooke	174
——— Holt *v.* Roe	447
——— Lord Teynham *v.* Tyler	390. 561
——— Pearson *v.* Roe	613
Doe, Rowe d. Durant *v.*	574
Drakeford, Rathbone *v.*	375

E

	Page
Earl of Shrewsbury *v.* Haycroft	194
Easterby *v.* Sampson	645
Edmonds, Goring *v.*	94
Edmondson, Craven *v.*	734
Edwards *v.* Bennett	230
Ellis, Hayllar *v.*	225
Evans, Rutherford *v.*	451
Ex parte Jefferies	195

F

Farren, Kemble *v.*	141
Fasson, Houlden *v.*	236. 424
Fearn *v.* Lewis	349
Felton, Adcock *v.*	441
Fenn d. Thomas *v.* Griffith	533
Fielder *v.* Ray	332
Finlay, Leggett *v.*	255
Ford *v.* Bernard	534
Forster *v.* Weston	527
Foster *v.* Charles	396
——— *v.* Weston	709
Fourdrinier, Afflalo *v.*	306
Fox *v.* Bishop of Chester	1
—— *v.* Clifton	776
Frear, Morley *v.*	547
Freeman, Delafield *v.*	294
French *v.* Brookes	354
Fussell, Walsh, Bart. *v.*	163
Fyson, Tuck *v.*	321

G

Garrett, Davis *v.*	716
——— Sheen *v.*	686
Gibney, Adams *v.*	656
Godefroy *v.* Dalton	460
——— *v.* Jay	616
Godley *v.* Marsden	433

Goodwin,

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	Page
Goodwin, Kay *v.*	576
Goring *v.* Edmonds	94
Gould *v.* Shoyer	738
Governor and Company of the Bank of England, Sir E. Stracy, Bart. *v.*	754
Graham, Hethrington *v.*	135
Green *v.* Pole	443
Greenslade *v.* Halliday	379
Griffith, Fenn d. Thomas *v.*	533
Groves, Kay *v.*	276
Grymes *v.* Boweren	437

H

Hack's fine	353
Hailstone, Wormwell *v.*	668
Hall *v.* Rex	181
Halliday, Greenslade *v.*	379
Hamilton *v.* Jones	628
Hammond *v.* Teague	197
Harding *v.* Pollock	25
Hargreave *v.* Smee	244
Harrison, Lancaster *v.*	728
Haycroft, Earl of Shrewsbury *v.*	194
Hayllar *v.* Ellis	225
Heathcote, Ashworth *v.*	596
Henley *v.* Mayor and Corporation of Lyme Regis	100
——— *v.* Burgesses of Lyme Regis	195
———, Williamson *v.*	299
Herbert *v.* Wilcox	203
Hethrington *v.* Graham	135
Hodgson, Simonds and Loder *v.*	114
Houlden *v.* Fasson	236. 424
Hughes *v.* Brett	239
——— Mitchell *v.*	689
Humphreys *v.* Knight	569. 572

J

Jay, Dicas *v.*	519
——, Godefroy *v.*	616
Jefferies, Ex parte	195
Jenner, Tyrell, Bart. *v.*	283
Jones, Hamilton *v.*	628
Joyce *v.* Pratt	377
Judson, Pinero, One, &c. *v.*	206

K

Kay *v.* Goodwin	576
—— *v.* Groves	276
Kemble *v.* Farren	141
Kent, Blogg *v.*	614
Knight, Humphreys *v.*	569. 572

L

Lafitte *v.* Slatter	623
Laing, Charrington *v.*	242
Lancaster *v.* Harrison	728
Lanyon, Taylor *v.*	536
Lawrence, Tomlins *v.*	376
Lawson, Clarkson *v*	266. 587
Leggett *v.* Finlay	255
Lewis, Fearn *v.*	349
Ling, Cockburn *v.*	732
Lloyd *v.* Wigney	489

M

M'Crandle *v.* Barwise	429
M'William, Parker *v.*	683
Maddison *v.* Nuttall	226
Marquis of Worcester, Shaw *v.*	385
Marsden, Godley *v.*	433
Martin, Maxwell *v.*	522
Maxwell *v.* Martin	522
Mayor and Corporation of Lyme Regis, Henley *v.*	100

	Page
Memoranda 200. 348. 480.	802
Middlecoat, Booth *v.*	445
Miles *v.* Cattle	743
Mills *v.* Collett	85
——, Saunders *v.*	213
Mitchell *v.* Hughes	689
Mitchenson *v.* Begbie	190
Moore, Roe d. Durant *v.*	656
Morley *v.* Frear	547
Morris, Charleton *v.*	427
Moser *v.* Newman	556
Murray *v.* Nichols	530

N

Nelson *v.* Wilson	568
Newbury *v.* Armstrong	201
Newell *v.* Simpkin	565
Newman, Moser *v.*	556
Nichols, Murray *v.*	530
Nuttall, Maddison *v.*	226

P

Parker *v.* M'William	683
Partington *v.* Wyatt	171
Paul, Williams *v.*	654
Phillips *v.* Tanner	237
Philpott *v.* Dobinson	104
Pinero, One, &c. *v.* Judson	206
Pole, Green *v.*	443
Pollock, Harding *v.*	25
Pott *v.* Turner	702
Pratt, Joyce *v.*	377
Prickett, Chapman *v.*	602

R

Rathbone *v.* Drakeford	375
Ray, Fielder *v.*	332
Reg. Gen. 347. 622.	802
Rex, Hall *v.*	181
Rex *v.* Sheriff of Middlesex (in the cause of Logan *v.* Louel)	251
Roake, Denn d. Nowell *v.*	475
Roe d. Durant *v.* Doe	574
——— *v.* Moore	656
—— Doe d. Holt *v.*	447
——, Pearson *v.*	613
Rose, Welsh *v.*	608
Rowe *v.* Softly	634
Russell *v.* Dickson	442
Rutherford *v.* Evans	451

S

Sampson, Easterby *v.*	645
Saunders *v.* Mills	213
Sawbridge, Demandant; Jeyes, Tenant; Parsons and Others, Vouchees	426
Scott, Doe d. Campbell *v.*	362
Sharp *v.* Sharp	630
——, Briggs *v.*	517
Sharpe *v.* Thomas	416
Shaw *v.* Marquis of Worcester	385
Sheen *v.* Garrett	686
Shepherd *v.* Bishop of Chester	435
Sheriff of Middlesex (in the cause of Logan *v.* Louel) Rex *v.*	251
Sherwood *v.* Tayler	280
Shillito *v.* Theed	753
Shoyer, Gould *v.*	738
Shuttleworth, Curling *v.*	120
Simonds and Loder *v.* Hodgson	114
Simpkin, Newell *v.*	565
Sir E. Stracy, Bart. *v.* The Governor and Company of the Bank of England	754

Sir

Page

Sir T. Wilson, Bart. Underhill v. 697
Slatter, Lafitte v. 623
Snee, Hargreave v. 244
Smith v. Campbell 637
——, Tatlock v. 339
——, Ward v. 749
Sotily, Rowe v. 634
Strange v. Wigney 677
Stuart, Day v. 109

T

Tanner, Phillips v. 337
Tatlock v. Smith 339
Taunton, West v. 404
Tayler, Sherwood v. 280
Taylor v. Lanyon 536
——, Willans v. 183. 512
Teague, Hammond v. 197
Theed, Shillito v. 753
Thomas, Sharpe v. 416
——, Addis v. 236
Tomlins v. Lawrence 376
Topham v. Dent 515
Towler v. Chatterton 258
Trustees of the British Museum, White v. 310
Tuck v. Fyson 321
Turner, Pott v. 702
Tyler, Doe d. Lord Teynham v. 390. 561
Tyrell, Bart. v. Jenner 283

U

Page

Underhill v. Sir T. Wilson, Bart. 697

W

Walsh, Bart. v. Fussell 163
Ward, Cook v. 409
—— v. Smith 749
Waters, Barling v. 423
Welsford, Cuming v. 502
Welsh v. Rose 638
West v. Taunton 404
Weston, Forster v. 527
——, Foster v. 709
White v. Trustees of the British Museum 310
——, Wilmer v. 291
Wigney, Lloyd v. 489
——, Strange v. 677
Wilcox, Herbert v. 203
Willans v. Taylor 183. 512
Williams v. Paul 654
Williamson v. Henley 299
Wilmer v. White 291
Wilson, Nelson v. 568
Womersley, Bousfield v. 801
Wood v. Adam 481
Wormwell v. Hailstone 688
Wyatt, Dance v. 486
—— Partington v. 171

CASES

ARGUED AND DETERMINED IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term,

AND THE VACATION PRECEDING,

In the Tenth Year of the Reign of GEORGE IV.

1829.

IN THE HOUSE OF LORDS.

Fox *v.* The Bishop of CHESTER.

June 3.

(In Error.)

THIS was a writ of error, brought by the Plaintiff below, from a judgment of the Court of King's Bench at *Westminster*, affirming a judgment of the court of great sessions at *Chester*, on a special verdict in a *quare impedit* commenced in the latter court.

The sale of a next presentation, the incumbent being *in extremis*, within the knowledge of both contracting parties, but without the privity or with a view to the nomination of the particular clerk, is not void on the ground of simony.

1829.

FOX
v.
The Bishop of CHESTER.

The first count of the declaration stated that the advowson of the rectory of the church of *Wilmslow* was appurtenant to the manor of *Bollyn*; and set out the title of *Thomas J. Trafford* for life thereto: that *T. J. Trafford*, by indenture, dated 12th *November* 1819, granted unto the Plaintiff, his executors, &c., the advowson of the rectory and parish church of *Wilmslow*, for ninety-nine years, if the grantor should so long live. Averment, that grantor was still living, and that the church became vacant by the death of the last incumbent, whereby it belonged to the Plaintiff to present, but the Defendant hindered him from so doing.

There was a second count, setting out a title to the advowson in gross, and omitting all mention of the manor; in all other respects it was similar to the first.

The Defendant craved oyer of the indenture made between the Plaintiff and *Trafford*, whereby it was witnessed, that in consideration of 6000*l.* paid to *Trafford* by the Plaintiff, the former had granted, bargained, sold, and demised, and by the said indenture did grant, &c., all that the advowson, donation, right of patronage, presentation, and free disposition of, in, and to, the rectory and parish church of *Wilmslow*, with the rights, members, and appurtenances thereunto belonging; *habendum*, for ninety-nine years, if *Trafford* should so long live. With a proviso that when and so soon as he the said *Edward Vigor Fox*, his executors, &c., should have presented to the said rectory or church of *Wilmslow*, by reason of the same having become vacant or void by the death, resignation, deprivation, eviction, promotion, or cession of *J. Bradshaw* the incumbent, or otherwise, or through the wilful neglect or default of him the said *Edward Vigor Fox*, his executors, &c., the said rectory or church should have been suffered, as to the presentation or right of presentation thereto to lapse, he the said *Edward Vigor Fox*, his executors, &c., should and would

1829.

Fox
v.
The Bishop of Chester.

would at any time or times thereafter at the request and proper costs and charges of the said *Thomas Joseph Trafford*, or such person as he should appoint, re-assign the said advowson to him the said *Thomas Joseph Trafford*, or such person as aforesaid, for all the residue which should be then unexpired of the said term of ninety-nine years, free from all incumbrances by the said *Edward Vigor Fox*, his executors, &c. He then craved oyer of the indenture in the second count mentioned, which was declared to be in the same words as the indenture in the first count, and therefore not set out on the record.

He then pleaded fifteen pleas, among which the fourth, the plea chiefly relied on, averred that the said church of *Wilmslow* is within the diocese of *Chester*, and a benefice with cure of souls, and that whilst the said *Thomas Joseph Trafford* was so seised of the said manor and of the said advowson and before the making of the corrupt simoniacal and unlawful agreement in this plea after mentioned, to wit, on the 11th day of *November*, in the year of our Lord 1819, the said *J. Bradshaw* then being the incumbent of and filling the said church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then despaired of, whereof, as well the said *Edward Vigor Fox* and *Thomas Joseph Trafford* as one *George Uppleby*, clerk, in that plea aftermentioned, to wit, on, &c., and also at the time of making the corrupt, simoniacal, and unlawful agreement in that plea aftermentioned, there had notice; that whilst the said *Thomas Joseph Trafford* was so seised of the said manor to which, &c., with the appurtenances, &c., and of the said advowson as aforesaid, and whilst the said *J. Bradshaw*, so being the incumbent of and filling the said church as aforesaid, was so afflicted, and in such danger, state, and condition as aforesaid, to wit, on, &c., at, &c., they

1829.

FOX v. The Bishop of CHESTER.

the said *Thomas Joseph Trafford*, *Edward Vigor Fox*, and *George Uppleby*, and each of them then and there, well knowing the premises, and believing and expecting that the death of the said *J. Bradshaw* of the mortal disease aforesaid, was then and there fast approaching, and that, by means of the death of the said *J. Bradshaw*, the said church would forthwith become vacant, it was in such belief and expectation corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, agreed by and between the said *Thomas Joseph Trafford* and the said *Edward Vigor Fox*, with the knowledge of the said *George Uppleby*, that the said *Edward Vigor Fox* should pay to the said *Thomas Joseph Trafford* a sum of money, to wit, the sum of 6000*l.*, and that the said *Thomas Joseph Trafford*, in consideration thereof, should grant, bargain, and sell to the said *Edward Vigor Fox* the next presentation to the said church; *and that, in order to make such grant, bargain, and sale, and as a means of making such grant, bargain, and sale to the said Edward Vigor Fox of the next presentation to the said church, and as a shift, contrivance, and device, to evade and elude the making such grant, bargain, and sale, as a mere grant, bargain, and sale to the said Edward Vigor Fox, of the next presentation to the said church in express terms, the said indenture in the said declaration mentioned to have been made between the said Thomas Joseph Trafford and the said Edward Vigor Fox should be made, and that the said Thomas Joseph Trafford should seal, and as his act and deed deliver the said indenture:* that afterwards, and whilst the said *J. Bradshaw*, so being the incumbent of, and filling the said church as aforesaid, was so afflicted and in such danger, state, and condition as aforesaid, to wit, on the 12th day of *November*, in the year of our Lord 1819, to wit, at, &c., in pursuance, furtherance, and performance of the said corrupt, simoniacal, and unlawful

unlawful agreement, and in order to make such grant, bargain, and sale of the next presentation to the said church, *and as a means of making such grant, bargain, and sale by the said Thomas Joseph Trafford to the said Edward Vigor Fox of the next presentation to the said church, and as a shift, contrivance, and device, to evade and elude the making such grant, bargain, and sale, as a mere grant, bargain, and sale to the said E. V. Fox, of the next presentation to the said church, in express terms,* the said indenture, in the said declaration mentioned to have been made between the said *T. J. Trafford* and the said *E. V. Fox*, was made, and the said *T. J. Trafford* did then and there seal, and as his act and deed deliver the said indenture: that the said *J. Bradshaw*, so being the incumbent of and filling the said church as afore said, remained and continued so afflicted as aforesaid, and in such danger, state, and condition as aforesaid from time to time in that respect in this plea above mentioned until the time of his death, and that afterwards, to wit, on the 12th day of *November* 1819, *Bradshaw* so being the incumbent of and filling the said church as aforesaid, of the disease aforesaid died, to wit, at, &c., and by means thereof the said church then and there became and was vacant: that, by reason of the premises and by force of the statute in such case made and provided, the said last-mentioned indenture became, and was, and is utterly void, frustrate, and of no effect in law, and wholly inoperative to grant, pass, or convey any estate, right, title, or interest in the said advowson, or any presentation, or any right of presentation to the said church to the said *E. V. Fox:* that afterwards, to wit, on the 30th day of *December* 1819, at, &c., the said *E. V. Fox*, under colour, and by pretence and means of the said last-mentioned indenture so made as aforesaid, in pursuance of the said corrupt, simoniacal, and un-

1829.

FOX
v.
The Bishop of CHESTER.

lawful agreement, did corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, present the said *George Uppleby* clerk to the said bishop, to be admitted, instituted, and inducted into the said church of *Wilmslow*, to wit, at, &c.: that by reason of the premises, and by force of the statute in such case made and provided, the said presentation of the said *George Uppleby* by the said *E. V. Fox*, so made as aforesaid, became, and was, and is utterly void, frustrate, and of no effect in law.

The fifth plea was like the fourth, omitting the parts in *italics*; and,

The sixth plea varied from the fourth only by omitting to state the privity of *Uppleby*.

The replication to the fourth plea took issue, that it was not corruptly, &c., agreed by and between the Plaintiff and *Trafford*, with the knowledge of *Uppleby*, as in that plea alleged. By a similar replication to the fifth plea, and to each of the other pleas, it was denied that it was corruptly, &c., agreed, as in those pleas alleged.

The jury found by a special verdict that before and on the 12th day of *November*, in the year of our Lord 1819, the said *Thomas Joseph Trafford* was seised of the manor and advowson within mentioned, and that before and on the said 12th day of *November*, in the said year of our Lord 1819, the within-named *Joseph Bradshaw* was the incumbent of the within-named church, in the pleadings within mentioned, and that the said church was then full of the said *Joseph Bradshaw*: that the said *Joseph Bradshaw*, so then being such incumbent of, and filling the said church as aforesaid, was, before and upon the said 12th day of *November*, in the said year of our Lord 1819, afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then greatly despaired

despaired of; and that he was and continued so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until the time of his death, and that the said *Joseph Bradshaw* so being such incumbent as aforesaid, died of the said mortal disease, on the said 12th day of *November*, in the said year of our Lord 1819, at half-past eleven o'clock at night of the same 12th day of *November*: that on the said 12th day of *November*, in the said year of our Lord 1819, at ten minutes before three o'clock in the afternoon of the same day, and whilst the said *Joseph Bradshaw* was such incumbent as aforesaid, an agreement was made and concluded, between the said *Thomas Joseph Trafford*, so being seised of the said manor and advowson as aforesaid, and the said *Edward Vigor Fox* for the sale, by the said *Thomas Joseph Trafford* to the said *Edward Vigor Fox*, of the next turn or presentation of the said church, for and in consideration of 6000*l.* of lawful money of *Great Britain*: that on the said 12th day of *November*, in the said year of our Lord 1819, and immediately after the making of such agreement they, the said *Thomas Joseph Trafford* and *Edward Vigor Fox*, in pursuance of such agreement, and in order to carry the same into effect, and as an expedient to convey the next presentation alone, sealed and delivered the within-mentioned indenture, bearing date the 12th day of *November*, in the said year of our Lord 1819; and that the said agreement was made, and the said indenture was sealed and delivered in the life-time of the said *Joseph Bradshaw*: that the said *Joseph Bradshaw* at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, was afflicted with the said mortal disease, and in extreme danger of his life, and that his life was thereby then greatly despaired of:

1829.

FOX
v.
The Bishop of CHESTER.

that the said *Thomas Joseph Trafford* and the said *Edward Vigor Fox*, at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, well knew and believed that the said *Joseph Bradshaw* was afflicted with the said mortal disease, and was in extreme danger of his life, and that his life was thereby then greatly despaired of: that the said agreement was made and concluded, and the said indenture was sealed and delivered without any knowledge or privity whatsoever of the said *George Uppleby*, and without any intention to present the said *George Uppleby* to the said church when it should become vacant.

Upon the argument on this special verdict, which took place in *June* 1822, the court of great sessions at *Chester* were divided in opinion; but in order to carry the cause up to a higher tribunal, the judgment was entered for the defendant by consent.

On a writ of error to the Court of King's Bench, the judgment of the court below was affirmed in *Hilary* term 1824; and the present writ of error was brought to reverse both judgments.

The question raised by this special verdict was, whether the sale of a next presentation, the incumbent being *in extremis*, within the knowledge of both contracting parties, but without the privity of, or a view to the nomination of the particular clerk, be alone, without other circumstances, void, on the ground of simony.

The statute of 31 *Eliz. c.* 6. *s.* 5., enacts, "And for the avoiding *of simony and corruption*, in *presentations*, collations, and donations of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, and inductions, to the same, be it further enacted by the authority aforesaid, That if any person or persons, bodies politic and corporate, shall or do at any time after the end of forty days next

1829.

FOX v. The Bishop of CHESTER.

next after the end of this session of parliament, for any sum of money, reward, gift, profit, or benefit, *directly or indirectly*, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurances, of or for any sum of money, reward, gift, profit, or benefit, whatsoever, *directly or indirectly, present or collate any person to any benefice* with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration; That then every such presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction, thereupon, shall be utterly void, frustrate, and of none effect in law; and that it shall and may be lawful to and for the queen's majesty, her heirs and successors, to present, collate unto, or give or bestow every such benefice, dignity, prebend, and living, ecclesiastical, for that one time or turn only; and that all and every person or persons, bodies politic and corporate, that from thenceforth shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant, or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical, and the person so corruptly taking, procuring, seeking, or accepting, any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend, or living ecclesiastical."

The case was argued by *Cross* Serjt., for the Plaintiff in error, and by the *Solicitor General*, for the Defendant in error. The reasons adduced on the part of the Plaintiff in error, for reversing the judgment of the court below, were as follows.

That by the law of *England*, the patronage or the right

1829.

FOX
v.
The Bishop of CHESTER.

right of presenting to a benefice is a property or estate capable of being conveyed in fee, for life, for years, for any number of turns, or for the next turn only, whilst the church is full; when it is empty, incapable of being conveyed, *Baker* v. *Rogers* (*a*), *Stephens* v. *Wall* (*b*), *Brookesby* v. *Wickham* (*c*), because it is like the rent of an estate become in arrear, which is a chose in action, and cannot be assigned. But the church is full as long as the incumbent is alive; and is equally so whilst he is in his last sickness, as in full health.

The patron, therefore, of a living may be changed at any time till the last moment of the existence of an incumbent, and a new patron substituted; and neither the common nor statute law imposes any restriction in this respect on lay patrons. (*d*)

It is the exercise only of the right of presenting by the patron for the time being, which is a public trust, and as such controlled by law: which sufficiently guards the interest of the church, by providing that the existing patron shall not nominate from corrupt motives, or by reason or in consequence of a corrupt contract.

This restriction arises from the statute 31 *Eliz. c.* 6. and from this statute only: and the questions turns entirely upon the construction to be put upon its provisions. It is a penal statute, and it creates forfeitures; and therefore, according to the acknowledged principle of law, must be construed strictly, and not extended by a supposed equity.

This statute avoids the presentation which the patron for the time being makes, for any money, reward, gift, profit, or benefit, arising directly or indirectly; or for any promise of such reward, directly or indirectly. It

(*a*) *Cro. Eliz.* 789.
(*b*) *Dyer*, 282 *b.*
(*c*) 1 *Leon.* 167.
(*d*) 12 *Ann. st.* 2. *c.* 12. applies to clerks only.

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1829.

FOX v. The Bishop of CHESTER.

is direct or indirect reward, not direct or indirect presentation, which it prohibits in express terms.

In the present case, Mr. *Fox* the Plaintiff in error was the patron at the time of the actual vacancy, and he selected the clerk, without any communication with Mr. *Trafford*; and his selection was not influenced or produced by money or reward, directly or indirectly. The presentation by the actual patron is not tainted with the least suspicion of simony.

To bring the case within the provisions of the act, it must be contended, as it was in the courts below, that Mr. *Trafford* was to be considered as the patron presenting the clerk, and receiving the reward for that purpose, and the Plaintiff in error as the mere instrument to carry such presentation into effect. But there is nothing in the finding of the jury to warrant such a conclusion.

It is admitted, that the grant of a next presentation during the life of an incumbent may be void, on the ground of simony; but that is where the contract is really simoniacal; a contract for the presentation *by* the patron of a *particular clerk*, for money, and the conveyance of the next presentation is a contrivance or instrument to carry it into effect. This will be illustrated by the case of *Winchcombe* and *Pulleston* (*a*), the leading case on the subject: the pleadings in *Winch's Entries*, 887. fully explain the nature of the transaction. The contract was made between the clerk to be presented and the patron, the incumbent being then sick of a grievous disease, and expected every day to die, that in consideration of 90*l.* to be paid by the clerk to the patron, he should procure him to be presented to the church when vacant, and to assure such presentation he should

(*a*) *Noy*, 25. *Hobart*, 165. 1 *Brownl. & Golds.* 164.

grant

1829.

FOX v. The Bishop of CHESTER.

grant the next avoidance to a person, a familiar friend of the clerk, specially nominated and appointed by him in confidence to make the presentation, with the intent that the clerk should be presented; and it is averred, that in performance of this contract the grant was made, and the contract was so found by the jury. Here was a clear simoniacal contract: and the substituted patron was the mere instrument to carry the contract into effect, and to appoint the particular clerk. The case of *Closse* v. *Pomcoyes* (*a*), is nearly to the same effect; and is another instance of a contrivance to carry into effect a simoniacal contract.

If the presentation do not appear upon the face of the pleadings to be clearly simoniacal, that is a presentation by the existing patron, of the clerk, for reward, it is a question for the jury whether each transaction be or be not a shift or contrivance to carry a simoniacal contract into effect; as, under the statutes against usury, if there appear on the face of an instrument a loan, and a reservation of illegal interest, the court can give judgment against its validity, but if the transaction does not appear on the face of it, *Yeoman* v. *Barstow* (*b*), *Kitchen* v. *Calvert* (*c*), necessarily to be usurious, it is a question of fact for the jury, and whether it be a shift or contrivance or not. In both the cases, the really simoniacal or usurious contract ought to be shown by a special plea when a special plea is required: and in all cases found by the jury.

The defendant has not pleaded in this case, and the jury have not found that there was any corrupt or simoniacal contract, that *Trafford* should present the clerk; and that the grant of the next presentation was a mere contrivance to carry it into effect.

(*a*) Cited *Lane*, 73. (*b*) *Lutw.* 273.
(*c*) *Lane*, 100.

In

1829.

FOX v. The Bishop of CHESTER.

In the absence of such a finding, the court cannot make any presumption against the validity of the grant. Simony as well as fraud is not to be presumed, but found.

But if it were competent for the court to make any presumption, the facts pleaded and found do not warrant any such presumption in this case.

If it had been found that money was to have been given to *Trafford*, if *Uppleby* should be presented, or that it was the purpose or even intent of the Plaintiff to have presented *Uppleby*, it might have been argued that the grant was made for that purpose, and if so, the grant may possibly be said to be an instrument to carry into effect the particular appointment; and the clerk may possibly be said to have been presented by the former patron. In such a case the substituted patron has no power of selection, but is a mere instrument, and the appointment, made virtually by the old patron, is an appointment made for reward. But if there is no intention or purpose to present any particular clerk, the new patron is a free agent, may select whom he pleases, and if he select any clerk, without reward, he is not within either the letter or spirit of the act. The selection of the clerk, the object aimed at by the statute, is free from all taint. The old patron parts with and the new patron purchases the right of selection, by means of the grant, and that right is fairly and properly exercised.

The judgment of the court of King's Bench (*a*) proceeds in a great degree upon the ground that courts have a right to consider what is an evasion of a statute, a power which it is humbly conceived does not apply at least to the case of a penal statute creating forfeitures,

(*a*) 2 *Barn. & Cress.* 658.

and

1829.

FOX
v.
The Bishop of CHESTER.

and if allowed to be exercised, would lead to great doubt and uncertainty in the law.

Upon referring to decided cases, there is none in which it has been held that the grant of a next presentation, the incumbent being *in extremis*, is void, a short note in *Winch*, 63. (*a*), excepted, in which mention is made of its having been so adjudged in Chancery, but under what circumstances does not appear: it may have been so adjudged on the special facts.

On the other hand, there is a solemn decision of the Court (*b*), that by the grant of an advowson, when the incumbent was on his death-bed, and it was uncertain whether he would live over the night, with full knowledge in the contracting parties, the next presentation did pass, and was not avoided by simony, which is a direct authority for the plaintiff in error. If the grant of next presentation, when united with all other future presentations, was not void, the grant of the next presentation alone could not be so. This decision has never yet been questioned until the present case.

The argument for the Defendant in error was in substance as follows: —

1st, Simony was an offence by the common law of the land, antecedently to the statute of 31 *Eliz. c.* 6.; and the transaction, as stated upon the record, was a corrupt and simoniacal contract for the sale of the next turn or presentation, under the special circumstances of the case. 1 *Institute*, 17 *B.* 3 *Institute*, 156. *Mackaller* v. *Todderick* (*c*), *Winchcomb* v. *Pulleston* (*d*), *Bartlett* v. *Vinor*. (*e*)

2dly, The presentation in the present case, was sub-

(*a*) *Sheldon* v. *Bret.*
(*b*) *Barret* v. *Glubb*, 2 *Black.* 1052.
(*c*) *Cro. Car.* 361.
(*d*) *Hob.* 167.
(*e*) *Carth.* 252.

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stantially a presentation by Mr. *Trafford* the seller, and was by him a presentation for money.

3dly, The transaction in question was a shift and contrivance to evade the provisions of the statute of the 31 *Eliz. c.* 6.

4thly, It was a presentation by Mr. *Trafford*, for money, of such clerk as Mr. *Fox* might nominate; and a contract to such effect is simoniacal, though it may have passed without the privity of the clerk, who may afterwards happen to be presented; the privity of a clerk is not a necessary ingredient in a corrupt or simoniacal contract, as has been established by several authorities, and particularly in Doctor *Hutchinson's* case (*a*); and in the case of *Baker* v. *Rogers*. (*b*)

5thly, By law no grant can be made of the next presentation, when the church is empty, *Brookesby's* case (*c*); of which rule, though it has been sometimes said that the reason is, that the presentation is then a fruit fallen, or that it is a mere personal privilege, or that is severed from the advowson, and would pass to the executor; the true and substantial reason is public utility, and the better to guard against the mischiefs of simony, as was expressly laid down by Lord *Mansfield*, Chief Justice, and Mr. Justice *Wilmot*, in the *Bishop of Lincoln* v. *Wolferston* (*d*), and the contract in the present instance was made upon the footing and understanding of the church being full in name and form only, but vacant in substance and reality.

6thly, The law, of which the object and policy is the presenting to benefices, with cure of souls, of men of learning and piety, and the preventing of scandal to religion, and prejudice to the church, by preferments either of improper persons, or from corrupt motives, will not

(*a*) 12 *Rep.* 100. 1 *Leon.* 167. 3 *Leon.* 256. *Dyer*, 282.
(*b*) *Cro. Eliz.* 788.
(*c*) *Cro. Eliz.* 174. S. C.
(*d*) 3 *Burr.* 1504.

endure

1829.
Fox
v.
The Bishop of Chester.

endure the danger which would arise from the sale of the right of presentation, when the incumbent is at the point of death, where the contracting parties know that fact, and where the contract is made with a view to and upon the terms of an immediate presentation.

7thly, There is no mischief intended to be guarded against by the rule of law prohibiting the sale of the next presentation, when the church is empty, which might not be equally incurred, if such presentation could be sold when the incumbent is on his death bed, and known to be so both to the buyer and to the seller.

8thly, The statute 31 *Eliz. c.* 6. ought to receive a liberal construction, in order to reach the evil for the remedy of which it was passed, and because the deed set forth in the record was only a contrivance to pass an immediate presentation for money, in violation of the policy and evasion of the provisions of the statute.

Lastly, In *Sheldon* v. *Bret* it was expressly decided, that a grant of the next turn for money was simoniacal, when the parson was sick in his bed, and ready to die.

On this day the opinion of the Judges of the Courts of Common Pleas and Exchequer was delivered as follows by

BEST C. J. My Lords, the question which Your Lordships have been pleased to put to the Judges in this case is, "Whether, upon the whole of the matters stated or referred to in the special verdict, the right to present to the rectory or parish church of *Wilmslow*, upon the death of the Reverend *Joseph Bradshaw*, was by law vested in *Edward Vigor Fox*, the plaintiff in error." The Judges who heard the argument at Your Lordships' bar are unanimously of opinion, that upon the whole matters stated or referred to in the special verdict, the right to present to the rectory or parish church of *Wilmslow*, upon the death of the Reverend

Joseph

1829.

FOX
v.
The Bishop of CHESTER.

Joseph Bradshaw, was by law vested in *Edward Vigor Fox* the Plaintiff in error.

The patronage of churches was at first yielded by the bishops to the lords of manors who founded or endowed them, and annexed them to the manors in which the churches were situate. By the grant of a manor, the advowson appendant to it passes to the grantee; many of these advowsons have since been severed from the manors to which they were appendant. Although advowsons, when *in gross*, as these which are separated from the manors to which they belonged are called, are a species of spiritual trusts, yet they have been said by Lord *Kenyon* and other Judges to be trusts connected with interests; and they certainly do not lose the temporal character which originally belonged to them, but may be sold either in perpetuity, or for the next or any number of avoidances. If the perpetual advowson be sold when the church is void, the next presentation will not pass; and if the next avoidance only be sold after the death of the incumbent, the sale is altogether void. It may be wise to carry the restraint on the sale of this species of property still further, and to say the next avoidance shall in no case be sold. Undoubtedly much simony is indirectly committed by the sale of next presentations. If it be proper to prevent the giving of money for a presentation, it seems equally proper to prevent the sale of that which gives the immediate right to present. But the courts of law have never thought that they were authorised to go this length; and even in cases where the purchase of the next presentation seemed to bring a party nearer to simony than in any other, it was found necessary to have the aid of the legislature to prevent such purchases. A clergyman might buy a next presentation, and present himself before the passing of the statute of the 12 *Ann. c.* 12. The preamble to the second section of that

1829.

FOX v. The Bishop of CHESTER.

statute states that "some of the clergy have procured preferments for themselves by buying ecclesiastical livings." And then the section provides, that if any one shall either directly or indirectly take or procure the next avoidance for money, reward, gift, profit, or benefit, or shall be presented or collated, (which words limit the operation of the act to clergymen), that it shall be deemed simoniacal.

It seems to me, that if the terms of the statute of *Elizabeth* could be extended by equity, the case of a clergyman buying a presentation with the intention of presenting himself might have been reached without any other act of parliament. If such a case as that were not within the statute of *Elizabeth*, the case, on which your Lordships have desired our opinion, cannot be affected by that statute. The church, in the present case, was full; no clergyman was privy to the agreement; and the living was not intended by the Plaintiff in error, at the time he bought the presentation, for the clerk that he afterwards presented. But I would observe, that persons have recovered who appeared to be dying. The special verdict only states, that the incumbent, at the time of the sale, was afflicted with a mortal disease, so that he was then in extreme danger of his life; and his life was thereby greatly despaired of; and that he was so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until his death, which happened at half-past eleven at night of the day on which the sale was completed. Many who are afflicted with mortal diseases, and are from such diseases thought to be in imminent danger of dying, live for a considerable time; and the effect of the diseases are sometimes so far suspended, that the persons so afflicted become again capable of performing the duties belonging to their stations in life.

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If this conveyance was void, it must have been void at the time it was executed, and would remain void into whatever hands and under whatever circumstances the right of presentation might have passed. Now, if this incumbent had been restored to apparent health, and the vendee had sold the presentation to another person, ignorant of the circumstances under which the first sale was made, it would be most unjust to hold that the second sale was void; and yet this would be the necessary consequence of a decision that the sale was simoniacal. Whilst the law permits the next presentations of livings to be sold during the lives of the incumbents, as long as the incumbent is alive the sale is good. Every one who purchases a next presentation contemplates the death of the incumbent. If this contemplation made the sale void, no sale of a next avoidance could be good. If the death of the incumbent, and the prospect of using the presentation, may be contemplated, the time when the death is to happen cannot be material.

This case has been compared by the counsel for the Defendant in error to those of contemplation of bankruptcy. But a party is not permitted to do an act in contemplation of bankruptcy which is injurious to creditors. A transfer of goods or payment of money in contemplation of bankruptcy, was, before the 6 *G.* 4., void. By that act such a transfer or payment is an act of bankruptcy, because such transactions are direct frauds on the creditors of the bankrupt. But the death of an incumbent may be contemplated, and the purchasing of the next avoidance, in consequence of such contemplation, is no fraud upon any one. The cases, therefore, have no resemblance to each other. The making the legality of the transaction to depend on the state of the incumbent's health would give occasion to much expensive litigation, and, probably, to much false

1829.

FOX v. The Bishop of CHESTER.

swearing, and would keep churches for a long time void.

The affairs of men are best regulated by broad rules, such as exclude all subtle disputes, all doubtful, unsatisfactory enquiries. It would be difficult to establish a rule that should settle what degree of probability of the approaching death of an incumbent should prevent the sale of the avoidance of a benefice, and more difficult to ascertain by evidence when an incumbent was within that degree. I submit to your Lordships, that the most convenient rule is that which I conceive the law has already established, namely, that the right to sell the presentation continues as long as the incumbent is in existence.

The judgment of the Court below is, according to the words of the Chief Justice, "founded on the language of the 31 *Eliz. c.* 6., and the well-known principle of law, that the provisions of an act of parliament shall not be evaded by shift or contrivance." The words of the fifth section of the act are, "If any person shall, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly present or collate any person to any benefice, or give or bestow *the same* for or in respect of any such corrupt cause or consideration." This clause applies only to the person presenting to the living. If he has received no reward or promise of reward, the presentation is not affected by the terms of the act. The Plaintiff in error, who made the presentation, received no reward, nor had any expectation of reward, for making this presentation. I agree, that if some other person had received a reward for the Plaintiff in error, and was to account to him for it,—if the Plaintiff in error was not the real purchaser of

of the avoidance, but the person presented, or some one in his behalf, these and many other things might be considered as frauds on the act, and have avoided the contract. But such things should have been shewn by the pleadings, and found by the jury. All that appears on this record is, that the Plaintiff in error bought the next avoidance of a living that was full; and that, without any corrupt consideration, he used the right of presentation which he had purchased. All this he had a right to do. There is no circumstance found that shews this is a fraud on the act, unless it be a fraud on the act to buy the presentation to a living which the seller and buyer expect will soon become vacant. Presentations are bought and sold every day with this expectation.

There is no legal authority to support the judgment of the Court, except a short and loose note in *Winch*'s Reports of *Hutton*, saying what used to be done in Chancery; on the other hand, the case of *Barrett* v. *Glubb* is directly opposed to the judgment of the Court of King's Bench. It was thought that case had not the weight of a judicial decision because it was not acted upon. But it was acted upon. Lord *Bathurst* decreed the conveyance of the advowson which included the next presentation, and gave the purchaser and his clerk their costs. The seller must have acquiesced in this decision, or he would have prosecuted his *quare impedit*; and if the Common Pleas had retained the opinion that they had certified to the Chancellor, he might have carried it by bill of exceptions to the King's Bench. When the Chancellor decreed a conveyance, without doubt it was such a conveyance as gave the purchaser a legal title from a time before the death of the incumbent, by making the assignment take effect from the date of the contract to assign; there was, therefore, no occasion for any injunction, as was supposed by the

1829.

FOX
v.
The Bishop of CHESTER.

King's Bench. The question, by the conveyance decreed, was fairly raised for another court of law, if the party had not completely acquiesced in the judgment of the Common Pleas, confirmed by that of the Chancellor. There are no other cases in the books which bear much on the question proposed to us by your Lordships. For the reasons given in support of the Judges' answer to that question I only am responsible.

Earl of ELDON. My Lords, I will trouble your Lordships with a very few words on this case, which involves questions, certainly, of very considerable importance. A case upon the same subject was decided by the Court of Common Pleas many years ago: and the manner in which that case was decided in the Court of Common Pleas was of very great importance, first, because it was decided by most learned Judges; and, secondly, because it was a case in which a court of equity sent the case for the opinion of that court, in order to enable that court of equity to decide what it should do in equity. The case was this: there had been the purchase of an advowson, the incumbent being at the time in such a state that he died within two days afterwards. I believe, indeed, the period was very nearly the same, if not exactly the same, as in the present case. Your Lordships will recollect it was one circumstance in that case, that the intended purchaser of the estate stated that there must be no delay, but that the contract should be immediately completed. The Court at that time was filled by Lord Chief Justice *De Grey*, a very eminent Judge, Mr. Justice *Blackstone*, and by two other Judges. The case was sent by Lord *Bathurst* for the opinion of the Court of Common Pleas, for the purpose of enabling the Lord Chancellor to determine whether the mere contract should be carried into execution by an actual conveyance. Now, that being the nature

1829.

FOX v. The Bishop of CHESTER.

nature of the case, and that being a case in equity, makes it a much stronger case than if the court of equity had not taken that course, because your Lordships will recollect that, with respect to many cases of contracts which come before courts of equity, the parties resort to a court of equity because it is conceived there are grounds upon which a court of equity will grant its interposition to carry into effect that contract. In that case the controversy was, whether, supposing that contract to be good in law, the party ought not to be left to his remedy at law instead of coming into equity for a specific performance of the contract; however, the Chancellor of that day thought fit to take the opinion of the Court of Common Pleas upon the question, whether the advowson being sold at such a period, nearly approaching to the death of the clergyman, the presentation as well as the advowson being included in the conveyance, carried with it the assignment of the presentation; and, my Lords, the Court of Common Pleas were of opinion that it did, and so they certified to the Court of Chancery. I observe in the proceedings in this case in the court below, the Court seems not to have been fully informed by the counsel at the bar; and I may take the liberty of saying so, because I see two Judges of that Court who now concur in the opinion that this was a good conveyance, and who then thought it was not a good one. The Court, my Lords, seem to me to have been not specifically informed as to what was the fact. We have heard it stated at the bar, that an injunction had been granted by the Lord Chancellor against the proceedings in the *quare impedit*; and that, after that opinion of the Court of Common Pleas was communicated to his Lordship, he did not continue the injunction. Now, my Lords, that circumstance is really of no weight. It was quite unnecessary to continue the injunction, because the moment it was intimated that in

1829.

FOX
v.
The Bishop of CHESTER.

the opinion of the Court of Common Law, the contract was a good contract to be carried into execution, it was not necessary to take the trouble of asking for the injunction being continued, for the conveyance was immediately executed which carried the contract into execution; and that conveyance having been executed, it would be a good conveyance of the presentation, as well as of the advowson. The conveyance being a good conveyance of the presentation, being declared by the Court of Chancery to be a good equitable conveyance of the presentation, and the Lord Chancellor proceeding on the opinion of the Court of Common Pleas, there was an end of all question. Now, my Lords, regarding the effect of this decision on human transactions, seeing that in all probability many transactions have taken place upon the footing of it, it does appear to me, I confess, very undesirable that that decision should be shaken by the courts of law. I confess I had much rather see an act of parliament than see a further extension of that doctrine of which we have heard in the argument at the bar; and I am very happy to take the opportunity of stating to your Lordships that I most fully concur in the opinion which has been expressed by the learned Judges.

The LORD CHANCELLOR. Is it your Lordships pleasure this judgment be reversed?

Judgment reversed.

1829.

IN THE HOUSE OF LORDS.

HARDING *v.* POLLOCK and Another.

THIS was a writ of error from the judgment of the Court of Exchequer Chamber in *Ireland*, affirming the judgment of the Court of Common Pleas in *Ireland* in this cause.

The appointment to the office of clerk of the peace is in the custos rotulorum of each county, and *King's County* in *Ireland* is not an exception. *Bayley* J. *diss.*

Henry Harding (the Plaintiff in error) claimed the office of clerk of the peace for the *King's County*, and had been several years in possession of it, under an appointment by the Custos Rotulorum of the county: *John Pollock* and *Arthur Hill Cornwallis Pollock* (the Defendants in error) claimed the same office under letters patent from the crown; and the action, which was for money had and received to their use, was brought by them in the Court of Common Pleas in *Ireland*, to ascertain whether the right to make such appointment for that county was in the crown, or in the custos rotulorum.

The Defendant below pleaded two pleas, first, the general issue; and, secondly, the statute of limitations, in both of which issue was joined; but as the Plaintiffs below, desiring merely to establish their right, sought only nominal damages, no question arose on the second plea, the object of which merely was to cover the profits received more than six years before the commencement of the action. The case was tried before Lord *Norbury*, the Chief Justice of the Court, at the sittings after *Michaelmas* term 1819, the venue being laid in the county of the city of *Dublin*. At that trial a special verdict was found, stating in substance as follows:— "That his late Majesty, King *George* the Third, by letters

1829.

HARDING v. POLLOCK.

letters patent under the great seal of *Ireland*, dated 30th *July* 1798, granted to the said *John Pollock* and *Arthur Hill Cornwallis Pollock* (the Defendants in error) the office of clerk of the peace within and throughout the province of *Leinster*, in *Ireland*, and within every county thereof, except *Kilkenny*, to hold for their lives, and the life of the survivor of them; which letters patent were duly enrolled in the Rolls office, on the 4th of *August* 1798, and were duly accepted by the said *John Pollock* and *Arthur Hill Cornwallis Pollock*, and that they are fit and proper persons to hold the said office; and that, by virtue of said patent, they duly obtained possession of said office in the *King's County*, and exercised the duties thereof by them, and their sufficient deputies, until the year 1800.—That the *King's County* is in the province of *Leinster*, and is one of the counties thereof; and that by an act of parliament in *Ireland*, of the third and fourth of *Philip* and *Mary*, and in the year of our Lord 1556, it was enacted, that the king and queen, and her successors, should be entitled to the counties of *Leix*, *Slievemarge*, *Irry*, *Glinmaliry*, and *Offally*, and that for making them shire grounds, a certain portion of the said counties should from thenceforth be a shire or county, by the name of the *King's County*, and that the residue should be a county by the name of the *Queen's County*. — That from the said year 1556 (at which time it appears by said act of parliament the lands comprised within the said *King's County* were first made a shire by the name of the *King's County*) the kings and queens of *Ireland* have nominated and appointed, and been used and accustomed to nominate and appoint, fit persons to fill the said office of clerk of the peace for the *King's County* to the said year 1798; and that the custodes rotulorum of said county have appointed persons to fill said office, in the said county, from the year 1760 to the present time, who have held and

1829.

HARDING v. POLLOCK.

and enjoyed the said office accordingly, and received the emoluments thereof, with the exception of *Hugh* and *Andrew Carmichael* appointed by the crown, and of one *James Cowly*, the deputy of the said *John Pollock*, who were severally in possession under the crown. The special verdict then stated, letters patent of his late Majesty, bearing date *October* 30th, 1766, and duly enrolled, by which the Earl of *Drogheda* was appointed custos rotulorum of said county during his Majesty's pleasure; and then set out a writing, under hand and seal, whereby the said Lord *Drogheda*, in 1772, appointed *Edward Moore Dowden*, clerk of the peace, and deputy custos rotulorum of the said county, during the pleasure of said Earl. It found, that said *Dowden* took upon himself the execution of the duties of the said office, and executed the duties, and received the emoluments thereof, until his death in 1789. And then set out an appointment of the said *Henry Harding* (the Plaintiff in error) in said year to said office, by said Lord *Drogheda*, under hand and seal, during good behaviour. It then found that said *Harding* was and is a proper person to hold the said office, and did all things necessary to qualify him to hold the said office, and to make him a complete clerk of the peace, and was admitted to the said office, and took on him the duties thereof, and has continued from thence to the present time to execute the duties, and receive the emoluments thereof, without interruption by any person, and conducted himself properly therein; that said Lord *Drogheda* is still (at the time of finding said verdict) custos rotulorum of said county. And that within the last six years the Defendant received fees and emoluments of the said office to the amount of one shilling."

On this special verdict, the Court of Common Pleas in *Ireland*, in *Trinity* term 1821, after full argument, gave judgment

1829.

HARDING v. POLLOCK.

judgment unanimously in favour of the said *John Pollock* and *Arthur Hill Cornwallis Pollock*, the Plaintiffs in said action.

From this judgment, *Henry Harding*, the Defendant in said action, brought a writ of error, returnable into the Court of Exchequer Chamber in *Ireland*, where he has assigned the general error only.

The case was fully argued in that Court, which, in *June* 1823, affirmed the said judgment of the Court of Common Pleas, two of the Judges dissenting; whereupon the original Defendant brought his writ of error returnable into parliament, where he again assigned the general error.

The case was argued in parliament by *Campbell* for the Plaintiff in error, and the *Solicitor-General* for the Defendants in error.

For the Plaintiff in error it was submitted, that the judgment of the Court of Exchequer Chamber ought to be reversed *in toto*, and judgment given for the Plaintiff in error.

First, because it did not appear that the Defendants in error were ever admitted to the office in question: secondly, because by the law of the land the custos rotulorum had the right to appoint to the office of clerk of the peace: and thirdly, because by the usage, as appearing on the special verdict, the Plaintiff in error had obtained a legal right to retain the office under the appointment of the custos rotulorum.

It was further submitted, that this special verdict was so imperfect that no judgment for the Defendants in error could be given upon it; but that, in case judgment should not be given for the Plaintiff in error, a *venire de novo* must be awarded, first, because the question of the admission of the Defendants in error was doubtful; and, secondly, because there was sufficient evidence

evidence of usage to entitle the Plaintiff in error to a verdict, or which ought to have been left to a jury to determine.

For the Defendants in error it was contended, that the county in question in this case having been made a county and brought within the pale of *British* law so late as the year 1556, prescription could not exist as to any of its offices or establishments; and that in the absence of prescription the appointment of all officers judicial, ministerial, or executive, concerned in the administration of public justice, belonged to the crown of common right, and was part of the prerogative.

Upon this argument the following questions were proposed for the opinions of the Judges: —

First, Whether the appointment to the office of the clerk of the peace within the shires of *England* did, by law, previously to the passing of the act of 37 *Hen.* 8. c. 1., belong of right to the crown or to the custos rotulorum of the shire by virtue of his said office, or to any and what other person or persons?

Secondly, Whether the appointment to the office of the clerk of the peace within the shires of *Ireland*, did, by law, in and previously to the year 1800, belong of right to the crown or to the custos rotulorum of the said shire by virtue of his said office, or to any and what other person or persons?

Thirdly, Whether the right to appoint to the office of the clerk of the peace within the *King's County* in *Ireland*, did, by law, in and previously to the year 1800, belong to the crown or to the custos rotulorum of the said shire by virtue of his said office, or to any and what other person or persons?

The authorities on either side are so fully considered in the opinions of four of the learned Judges, that it has been deemed improper to print the argument of counsel.

BAYLEY

1829.

HARDING v. POLLOCK.

BAYLEY J. My Lords, I regret extremely that I cannot bring myself to concur in the opinion the other Judges have formed in this case.

The first question proposed by your Lordships to our consideration is this, Whether the appointment to the office of clerk of the peace within the shires of *England* did, by law, previously to the passing of the act of 37 *H.* 8. *c.* 1., belong to the crown or to the custos rotulorum of the shire by virtue of his said office, or to any, and what other person or persons? I consider it to have belonged to the crown if the crown reserved it to itself: that it belonged to any other person or persons (at least if named in the commissions of the peace) upon whom the crown chose to confer it, if the crown thought fit to give it away: or that if the crown did not think fit to reserve or confer it, it belonged of right to the justices at large in quarter sessions assembled. Your Lordships' question appears to me to propose, as a mere point of law, to whom by law the right belonged, and my answer is framed upon that view of the question. I do not say, therefore, that the crown did not in fact confer this right upon the custos rotulorum; all I say is, that, unless it did so confer it, the custos has it not.

The courts of sessions of the peace originated, I apprehend, in the reign of *Ed.* 3., and were founded upon commissions issued in pursuance either of 18 *Ed.* 3. *st.* 2. *c.* 1., or of 34 *Ed.* 3. *c.* 1. The former of those statutes provides that two or three of the best reputation in the counties shall be assigned keepers of the peace by the king's commission; and, at what time need shall be, the same, with other wise and learned in the law, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties. The 34 *Ed.* 3. *c.* 1. directs, that in every county in *England* shall be assigned for keeping

ing of the peace, one lord, (*un seigneur*), and with him three or four of the most worthy in the county, with some learned in the law, with power to hear and determine, at the king's suit, all manner of trespasses done in the same county. Both these statutes are silent as to the offices and the constitution of the Court; then, as it seems to me, a question of law arises, What could legally be done? and, secondly, a question of fact, What was done? Where the crown erects a court of justice of its own authority, it may, I apprehend, fix and nominate what officers it shall have, and how their successors shall be appointed; and, I take it, it has the same power where it creates a court of justice under the direction of parliament, unless there be something in the act of parliament from which a contrary intention in the legislature may be collected: the legal presumption appears to me to be that the legislature will break in as little as possible with the prerogative of the crown, and that what it does not by express words, or by necessary implication, take away, it leaves in the crown. Upon the establishment of this court, therefore, the crown might, if it thought fit, appoint one of the justices to be custos rotalorum, or it might omit it; it might name a clerk of the peace, or reserve to itself the future right of nominating the successors; or it might omit to name him, and be silent as to the office; and then the sessions would have had the right, as incident to their being a court, to decide upon having such an office: and the right to appoint him would be either in the sessions, if the crown made no other provision as to the appointment of officers, or in such other person or persons on whom the crown had conferred the right. And whatever the crown might do in the first instance, would either be variable upon future occasions or not: in the former case the crown might resume to itself the right when it thought fit; in the latter, the nomination and

1829.

HARDING v. POLLOCK.

and appointment could not have belonged to the custos rotulorum, unless he had been appointed *ab initio*.

Lambard, in his *Eirenarchia*, intimates that there was extant in his time one of the commissions granted in the 35 *Ed.* 3.; and if we could discover the commissions granted at that time, and could be satisfied the commissions for the different counties were uniform and all of the same tenor, they might throw great light upon the question as a question of fact, though they could not be admitted in argument upon the question of law. Suppose those commissions to have been silent as to the custos, and to have reserved to the crown the right of appointing a clerk to the justices; can there be a doubt but that such right would have been well reserved? Suppose the commissions to have nominated a custos, and to have given him the power *pro hâc vice* to have nominated the clerk of the peace, would not that have been a valid gift? and would it have been valid for more than that term? Would it not equally have been valid had the nomination been given to the justices at large, though it had appointed one in particular to be custos rotulorum? Suppose it to have nominated no custos, and to have been silent as to the clerk of the peace, would not the justices in sessions, that is the court, have had the power to nominate such clerk? Such power, according to *Rolle's Abr.* 526., is incident to every court. Suppose the commissions for different counties to have varied, or suppose them to have varied at different times, what would then have been the case? That they did vary as to the county palatine of *Lancaster*, is clear from the exception in 1 *W. & M. st.* 1. *c.* 21., and from the modern practice; and that they varied as to other places, may be collected from the exception in 37 *Hen.* 8. *c.* 1. *s.* 5. In *Durham*, at present, the bishop is his own custos: the provisions in 37 *Hen.* 8., and also in 3 & 4 *Edw.* 6. *c.* 1. *s.* 5., shew he may make another

another person so; but he appoints the clerk of the peace for the county without noticing his own character as custos rotulorum, and his grant of the office is confirmed by the Dean and Chapter of *Durham*. In *Lancashire*, Lord *Derby* is appointed custos rotulorum by the king under the seals of the duchy and county palatine of *Lancaster*, and Lord *Clarendon* is appointed clerk of the peace under the same seals; and, so far from any expression that he is to be deputy to the custos rotulorum, the custos rotulorum is distinctly enjoined to permit him to exercise his office without impediment, hindrance, molestation, interruption, or denial. And let me press upon your Lordships' consideration, the argument which arises from the practice in *Lancashire* and other privileged places. The statute 34 *Ed.* 3. applies to every county of *England*, *Lancaster* therefore is included, and what is the case in the other counties in *England* must be the case there. If the custos had *ex officio*, as matter of law, the right in every other county in *England*, before 37 *Hen.* 8. he must have had it there. If the king were precluded from nominating in ordinary counties, he must have been precluded there: if it would have been illegal elsewhere, it would have been equally so there. According to 4 *Inst.* 204. it was not till 50 *Ed.* 3. that he erected the county of *Lancaster* into a county palatine in parliament; the practice, therefore, even if it be confined to *Lancashire* alone, seems to establish the point that this is a question of fact, not matter of law. And what would your Lordships say, if the early commissions passed immediately after 34 *Ed.* 3. were before your eyes, and you were to find that many of them sanctioned the same practice as has prevailed in *Lancashire*: would this have no influence upon your judgment? Would it not, on the contrary, be the foundation on which you would act?

My Lords, the argument that we are at liberty to

1829.

HARDING v. POLLOCK.

decide as matter of law, upon the right of the custos rotulorum to nominate, is founded on the recital in 37 *Hen.* 8. *c.* 1. on Lord *Coke's Comment on the Statute of Westminster*, 2., 2 *Inst.* 425., and on the opinion of Lord Chief Justice *Holt* in *Harcourt* v. *Fox.* (*a*) The recital in 37 *Hen.* 8. is, "that where before this time the Lord Chancellor hath, by reason of his office, the nomination and appointment of the custos rotulorum, and in like manner the custos rotulorum hath had until now of late the nomination and appointment of the clerk of the peace within the shire where he was custos rotulorum, and where now of late sundry persons not learned, nor meet, nor able for lack of knowledge to occupy the said offices of custos rotulorum and clerk of the peace, have gotten grants by the king's letters patent of the clerkship of the peace;" and it thereupon enacts that every custos shall nominate the clerk of the peace within his shire, and the custos and clerk of the peace shall execute the said offices by themselves and able deputy. This recital that the custos till of late hath had the nomination, may, as it seems to me, refer to the practice as matter of fact, without referring to the right as matter of law: the recital does not state, that of right he hath had, but states the fact only, that he has had; and the statute does not declare and enact, but enacts only; and it does not from beginning to end insinuate that the patents of the clerks of the peace were illegal or the grants void. On the contrary, it confirms the persons then in office in their respective offices; and if it were referring to the right as matter of law, it would, as it seems to me, go too far and mistake the right, as the right, unless there were something to shew the contrary, would be in the sessions, not in the custos. I admit Lord *Holt's*

(*a*) 1 *Show.* 426. 506. 516. 4 *Mod.* 167. 12 *Mod.* 42. *Show. Parl. Cas.* 158.

opinion

opinion in *Harcourt* v. *Fox* is very strong, that the right of nominating the clerk of the peace belongs to the custos rotulorum of common right, by the common law of the land: but that was not the point in judgment; it was incidental only to the case under consideration; none of the other Judges concur with him; and his conclusion is, "So that now having, as well as I can, given an account of the nature of the office of the custos, and the reasonableness of his not having the nomination of the clerk of the peace, I shall now give the particular reasons upon which I ground my judgment in this case."

My Lords, I am aware one of the main foundations for his opinion is, that the clerk of the peace must be trusted with the possession of the rolls to make entries upon, and that the custos rotulorum would be answerable to the king and to the subject in case of their loss, and that it would be the most unreasonable thing in the world that the custos rotulorum should be answerable for such miscarriage unless he had the appointment. But the answer to that argument is, that if the clerk of the peace has the possession of the rolls, not as deputy to the custos, but as the officer of the court, the custos would not be answerable to the king, or to the public, in case of their loss or destruction whilst they remained necessarily in the hands of the clerk of the peace; and as to the notion of unreasonableness, that objection has applied at all times as to the county palatine of *Lancaster*; and it has applied in every county in *England* since 1 *W. & M.*, where a new custos rotulorum has been appointed in the lifetime of a preceding clerk of the peace; and applied to the very case they were then deciding: for the decision was, that the old clerk of the peace was entitled to continue though the custos who appointed him was removed, and a new custos appointed. Another argument he relies upon is drawn from the practice as to the clerk of assize and the county

1829.
HARDING
v.
POLLOCK.

clerk in *Mitton*'s case (*a*), and the reasons given in 2 *Inst.* 425. for that practice; but both those offices are considered in 2 *Inst.* as having existed before the time of legal memory, and the crown may be excluded by time from interfering as to ancient offices, though it is not prevented from interfering as to offices created within time of legal memory. It may be observed, too, that Lord *Holt* speaks of the possession of the rolls by the custos as possession of them by all the justices (1 *Show.* 528.); that he speaks of the clerk of the peace as the senior of the justices in court; and it may be of some service if I shortly notice how this matter was treated by the counsel in argument, and by the other judges, and if I call to your Lordships' observation how it was again treated when another opportunity occurred. Sir *T. Powys* argued that the custos was in the nomination of the Lord Keeper, and I think, as anciently, the nomination of the clerk of the peace in the custos. But the clerk of the peace is not the clerk of the custos, but of all the justices in general, and properly the clerk of the sessions. Mr. *Hawles*, who argued for the Defendant, says that the statute of *Ed.* 3. makes no mention of such an office, but it was an incident. Justices would not make and draw out their own records, and in all probability he who is called in the statute of *Ric.* 2. their clerk was appointed by the justices to do that work for them. He supposed that the clerk of the peace was at first the keeper of the records, but afterwards he that was most eminent for quality among the justices was appointed custos, and he appointed the clerk of the peace, his deputy or servant. *Levins*, who was for the Plaintiff upon the second argument, says, "Should I go about to enquire into the origin of the office of custos, I should attempt *ambulare in tenebris.*" As to the office of clerk

(*a*) 4 *Rep.* 32.

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of the peace, he says, "I cannot say how it was before the statute of *Hen.* 8.; before there were justices there were conservators, and it is likely they had their clerk to do their business and keep their records, and it is likely this officer was in imitation of that, but I cannot directly tell how things might be, for this matter is all *in nubibus.*" Mr. Justice *Eyre* says (in substance), "We are, I confess, much in the dark as to the beginning of the office of clerk of the peace, but the statute of *W. & M.* takes him wholly out of the power of the custos, and subjects him to another jurisdiction, that is, to the sessions of the peace, to which he is properly an attendant." Mr. Justice *Gregory* notices that in 2 *Hen.* 7. fol. 1. he is called not only clerk of the peace, but *attornatus domini regis;* and that, says he, is a proper name of office for him, for he draws the issues upon traverses, and so acts as attorney in that court for the king. Mr. Justice *Dolbin* is silent as to these points; and it is therefore by Lord Chief Justice *Holt*, and by him only, that they are principally discussed. These opinions were delivered in *Trinity* term, 5 *W. & M.* None of the other reporters of this case give the detailed account of Lord *Holt's* argument. *Shower*, in 4 *Mod.* 178. unites all the arguments of the Court, and puts it thus: As to the beginning of this office we are much in the dark, for we can only make probable conjectures about it; and as to his continuance in office, it is not to be collected out of any of the law books before 37 *Hen.* 8. It is plain it was not an office time immemorial, because the commission of the peace is not so. Afterwards it became necessary for one to make entries and join issues; the custos appointed a clerk for that purpose, who is now called clerk of the peace; and this seems very agreeable to the statute of *Westminster* 2d, by which it appears that such officers and clerks who are to enter and enrol the pleas were always appointed by the judge or chief

1829.

HARDING v. POLLOCK.

minister of the court. *Comberbach*, 210. only says the nomination of the clerk of the peace belonged to the custos as the most proper person. 2 *Inst.* 425. Within five years, namely, in *Hilary* term 8 & 9 *W.* 3., whilst the opinion of Lord *Holt* must have been within the recollection of every Judge in *Westminster Hall*, a question as to the office of clerk of the peace again arose in *Owen* v. *Saunders* (*a*), and *Harcourt* v. *Fox* was expressly referred to. The question was, Whether, under the statute of 1 *W. & M.*, a nomination by the custos rotulorum to the office of clerk of the peace by parol was good? and Mr. Justice *Powell*, a lawyer of no mean talent and acquirements, said, "It had been objected that this clerk of the peace was originally but a deputy to the custos rotulorum, and therefore not properly an officer. But he was of opinion that he is, and was originally an officer, and not merely a deputy to the custos rotulorum. The statute 12 *Ric.* 2. *c.* 10. appoints him wages, and there he is called clerk of the justices of the peace, and he is in the nature of attorney-general to the king, wages being still paid. In 2 *Hen.* 7. *c.* 1. he is called clerk of the peace." Lord Chief Justice *Treby* said, "The original of this office of custos rotulorum is not very clear, but in all probability the trust of the conservator of the rolls was committed to one of the justices, and then he was called custos rotulorum; and probably by the consent of his brethren he nominated the clerk of the peace. He is called so in 18 *Hen.* 4. *c.* 10. *pl.* 33. 12 *Ric.* 2. *c.* 10. calls him clerk of the justices, and appoints him wages; and 2 *Hen.* 7. *c.* 1. first makes mention of custos rotulorum." Can it have escaped your Lordships that in this case Justice *Powell* almost goes out of his way to state that the clerk of the peace is not a deputy to the custos, but

(*a*) 1 *Ld. Raym.* 158. *Salk.* 467. 5 *Mod.* 386.

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1829.

HARDING v. POLLOCK.

an original officer; and that Lord Chief Justice *Treby*, notwithstanding the previous opinion of Lord *Holt*, intimates that the origin of the custos rotulorum was not very clear, and that, instead of its belonging to the custos rotulorum of common right, and by the common law of the land to nominate the clerk of the peace, he probably was nominated by consent of his brethren? Permit me also to call your Lordships' attention to the charge to the custos rotulorum in the ordinary commissions of the peace, and to the observations as to the duties at the sessions of the custos rotulorum, and the clerk of the peace in *Lambard's Eirenarcha*. The earliest commission I have met with is at the commencement of *Herbert's Justice*, in the edition of 1547; and at the conclusion it commands "*John Fitzjames*, that, at the days and places aforesaid, he cause to come writs, precepts, processes, and indictments aforesaid, before himself and his said companions, and inspect and determine the same." In another edition of the same book, printed in 1606, there is a similar clause, except that it seems addressed to all the justices, and not to any one by name; but this may be a mistake in the text, because in the margin it is stated to be "*Al custos rotulorum;*" and the same book, in the form of what is called "the new commission" contains this clause, "Assignavimus denique te præfatum Ewd. H. militem" (not the person first named in the commission, for the officers of state are first named), "custodem R. pacis nostræ in dicto comitatu nostro; ac propterea tu, ad dies et loca predicta, brevia, precepta, processus, et indictamenta predicta coram te et dictis sociis tuis venire facias, et inspiciantur et debito modo terminentur." *Lambard*, in his *Eirenarcha*, speaks of sessions and, among other things, of the officers bound to attend. "Two sorts of men there are that are the ordinary attendants at

1829.

HARDING v. POLLOCK.

the sessions, that is, the officers of the court and the jurors. Among the officers, the custos rotulorum hath worthily the first place, both for that he is always a justice of the quorum in the commission, and among them of the quorum a man, for the most part, especially picked out for wisdom and credit; and yet in this behalf he beareth the person of an officer, and ought to attend, for the words in the commission be to him now by his proper name. 'Quod, ad dies et loca predicta, brevia, precepta, processus, et indictamenta predicta coram te et dictis sociis tuis venire facias.' Whereas until the 14 *Ric.* 2. that charge was general to all the justices, and not laid specially upon any one person in the commission, as it doth appear in the Tower by the records which I have already vouched" (see *Lambard*, 373, &c., printed in 1602). By the commission in a county, the custos rotulorum ought to attend at the sessions, with records, &c. (*Com. Justices of the Peace*, D. 4.); "the clerk of the peace oweth his attendance at the sessions also, for (omitting certain things specified) he readeth the indictments and serveth the court. He enrolleth the acts of the sessions and draweth the process. He also must deliver letters to all such as be acquitted of felony, &c. &c. All which things he cannot do if he be not present; so that he is an officer to this court, and clerk of the justices, as the 12 *Ric.* 2. nameth him, and not, as Mr. *Barrow* thought, the clerk of the custos rotulorum only." And that, as it seems to me, is the true state of the case: the custos rotulorum, though one of the justices, is, in respect of his custody of the rolls, to attend with the rolls in the court, and the clerk of the peace, as a distinct officer of the court, is to record upon such rolls such acts of court as are to be recorded; and when he has recorded them it is his duty to hand them over to the custos rotulorum, that he may keep them in safe

safe custody, though the clerk is entitled to have them whilst in process. In *Rex* v. *Evans* (*a*) the opinion of Lord Chief Justice *Holt* approaches this point, where he says the clerk of the peace is bound to deliver the rolls to the custos when completed, though he is entitled to have them whilst in process. If there ever was a time when the rolls were in the custody of the justices at large, without any custos rotulorum, this would be the case; and I see no reason why it should not continue to be the case when one justice in particular was selected to be custos rotulorum. My opinion, therefore, is,—not negatively, that the right of appointing is not with the custos rotulorum, nor that the right is affirmatively either with the king or with the quarter sessions,—but that the question with which of them it is, is matter of fact for the consideration of a jury, not matter of law for the decision of a court; and with this view the case of *Bridgman* v. *Holt* (*b*), and the state of the officers in the superior courts exactly accords. In *Bridgman* v. *Holt* the question was, Whether the office of clerk of the peace for enrolling pleas in the King's Bench was in the king or in the chief justice? The defendant, who claimed under the chief justice, proved a series of grants for a period of 235 years, whenever the office became void. It was treated, therefore, as a question of fact, not as a question of law. And what is the state of the other officers of the superior courts, and upon what principle is it to be explained? Why does the chief justice of the King's Bench appoint the custos brevium in the King's Bench, whilst the gift of the same office in the Common Pleas is not in the chief justice there, but in the king or his grantee? Why are the first and third prothonotaries in the Common Pleas in the gift of the chief justice,

(*a*) 4 *Mod.* 31. (*b*) *Show. Parl. Cas.* 111.

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1829.

HARDING v. POLLOCK.

and the second in the custos brevium? Why does the king appoint the master of the crown office in the King's Bench, and the chirographer in the Common Pleas? Why is the office of exigenter in the Common Pleas an inseparable incident to the person of the chief justice, so that a grant thereof by the king whilst the office of chief justice is vacant, is null and void? Why do the three puisne judges of the King's Bench appoint the signer of the bills of *Middlesex?* All is referable to what is mentioned as the ground of the opinion in *Scroggs* v. *Coleshill* (*a*), viz. prescription and usage. And what is the foundation of prescription and usage but a lost grant? Upon the whole, therefore, I submit to your Lordships that the question in whom the right of appointing was in *England*, before 37 *Hen.* 8., is matter of fact, depending upon commissions issued in the different counties in *England*, and the usages thereon; and that, until such matter of fact is duly enquired into and ascertained, it cannot be answered as a question of law.

To the second question,—as every observation I have made upon the first question applies with equal force upon the second,—I submit to your Lordships, that it is also a question of fact, not a question of law, in whom the right in *Ireland* was.

The third question appears to me to depend upon the point already noticed, viz. the right of the crown in the commissions at first granted under the statute of *Ed.* 3. to reserve to itself the right of nominating to the office of clerk of the peace; for if the right existed when those commissions were granted, it seems to me to have existed, as to this county, when a commission for this county was first granted: if the crown had originally a right as to each county to mould the machinery as it

(*a*) *Dyer*, 175.

pleased,

pleased, and to reserve to itself such nominations as it thought it behoved the public weal it should reserve, it must have had the same right as to this county, when first it became an object of consideration, as it had in every other. I am therefore of opinion, upon the last question proposed by your Lordships, that the right of appointing the clerk of the peace in the *King's County* in *Ireland*, when the district that county comprises was first made a county, was in the crown.

LITTLEDALE J. My Lords, upon the first question, I am of opinion that the right to appoint to all the offices connected with the administration of justice is vested in the crown by the royal prerogative; and if the crown by its royal prerogative constitutes a new court of justice, it may appoint the judges of the court, and all the subordinate officers, upon such terms as it shall think proper. So also if the crown, by virtue of an act of parliament, is authorized to constitute a court, it may appoint the judges of that court, and also the officers, in such manner as it may deem most expedient to carry into effect the object of the legislature. But if, in the constitution of a court formed under the authority of parliament, the crown appoints the judges, but does not appoint the officers of the court, but is silent as to the appointment of any officer; then I apprehend, as a matter of law, the power of appointing the officers belongs to the Court itself, or to some member or members of the Court to whom particular duties are assigned, and who, in the discharge of those duties, must commit the performance of the minor part of those duties to some subordinate officer or clerk: if the crown has once waived the right of appointing the officers, and has suffered either the judges of the court at large, or some particular judge to whom special powers are confided, to appoint the officers necessary to conduct the subordinate

1829.

HARDING v. POLLOCK.

ordinate business of the Court, then, I apprehend, the crown cannot afterwards interfere, and take from the court, or particular members, the appointment of the subordinate officers; for otherwise great confusion would ensue in the administration of justice, the officers acting under the authority of the Court, but being liable to be displaced: and the crown, by allowing the Court to appoint the officers in the first instance, has manifested its intention that that should be the course of proceeding in the administration of justice in that court. If I am right in taking this view of the subject, I think it will follow that the appointment to the office of clerk of the peace within the shires of *England* did, by law, previously to the passing of the act of 37 *H.* 8. *c.* 1., belong of right to the custos rotulorum of the shire by virtue of his office.

The office of custos rotulorum, and that of clerk of the peace, are offices created within the time of legal memory. No immemorial usage or prescription can therefore be applied to either of them. But if it be true that, in the cases of ancient courts or superior officers entrusted with the administration of public justice, the principle be recognized that the members of the court, or some superior officer, have appointed the subordinate officers or clerks to assist in the administration of justice; then I take it, on the creation of new courts or superior officers within time of memory, the same principle will apply, that the Court or superior officer, as the case may be, have, as incident to the court or office, a right to appoint the subordinate officers or clerks, — saving always the right of the crown, on the first creation of the court or superior office, to constitute and regulate it as it thinks proper, both as to the subordinate officers and clerks, and in other respects as the crown thinks fit.

The oldest authority that recognizes this common law principle is the statute of *Westminster* 2d, 13 *Ed.* 1. *st.* 1.

1829.

HARDING v. POLLOCK.

st. 1. *c.* 30., "That all justices of the benches from henceforth shall have in their circuits clerks to enrol all pleas pleaded before them, like as they have had in time passed." And Lord *Coke*, in commenting upon this statute in 2 *Inst.* 425., says, "This power is as anciently they used to have, that is, by the common law;" and he states the reason why this clause of the act was passed, was, that the king had been informed that he might appoint the officers on the circuits, which this writer declares to belong to the justices, and that they enjoyed the same of ancient time, that is, by the common law; and then he goes on to give the reason of the justices having this power;—(at present, indeed, the senior judge appoints, and has done so for a considerable time past; how this has happened I cannot now ascertain; whether the second judge had acquiesced in the senior judge appointing so long, that it cannot now be objected to; or whether the practice in modern times may be evidence of a usage before the time of legal memory, so as to found a right such as the statute referred to on ancient usage;)—"and the reason thereof is twofold: first, for that the law doth ever appoint those that have the greatest knowledge and skill to perform that which is to be done; second, the officers and clerks are but to enter, enrol, or effect that which the justices do adjudge, award, or order, the insufficient doing whereof maketh the proceeding of the justices erroneous, than the which nothing can be more dishonourable and grievous to the justices, and prejudicial to the party; therefore the law, as here it appeareth, did appropriate to the justices the making of their own clerks and officers, and so to proceed judicially by their own instruments, and this was the common law. The king cannot grant the office of the shire or county clerk (who is to enter all judgments and proceedings in the county court), for that the making the shire clerk belongeth

1829

HARDING v. POLLOCK.

belongeth to the sheriff by the common law, as in *Mitton's* case it appeared, *et sic de cæteris.*" In *Mitton's* case (*a*), Queen *Elizabeth* had granted the office of county clerk or shire clerk to *Mitton* and others. The Queen appointed *Hopton* to be sheriff of the county, who interrupted *Mitton*. It was resolved that the county court, and the entering of all proceedings in it, are incident to the office of sheriffs, and, therefore, cannot by letters patent be divided from it; and after adverting to some other points which had been raised, it goes on to state, that, as a general answer to all objections, "great inconvenience would ensue to sheriffs, who are great and ancient officers and ministers of justice, if such grants should be of validity; for by such, as well the entering of all proceedings in the same court, as the custody of the entries and rolls thereof, do belong to the office of sheriff:" he proceeds afterwards to say, "If the record be embezzled, the sheriff shall answer for it, and therefore it would be full of danger and damage to sheriffs if others should be appointed to keep the entries and rolls of the county court, and yet the sheriff should answer for them as immediate officer to the court; and therefore the sheriff shall appoint clerks under him in his county-court, for whom he shall answer at his peril; the same law of the sheriff's tourn; and law and reason require that the sheriff, who is a public officer and minister of justice, and who has an office of such eminence, confidence, peril, and charge, ought to have all rights appertaining to his office, and ought to be favoured in law before any private person, for his singular benefit and avail." And then it goes on to state, that the sheriffs shall have the custody of gaols, and shall put in such keepers for whom they will answer; and the reason given is, because they shall be answer-

(*a*) 4 *Rep.* 32.

able

able for escapes. And it goes on to state, that it would be against all reason that they should be answerable for escapes, and subject to amerciaments, and yet that another should have the keeping and custody of the gaol. The parliamentary declaration in the statute of *Westminster*, and Lord *Coke*'s Commentary, and also the resolution in *Mitton*'s case, seem sufficient to shew, that in ancient offices the right of appointment of the subordinate officers and clerks is in the Court, or the superior officer, as the case may be. And I apprehend, that if a new court or office be created, the same rules will attach, as the reasons for it are precisely the same. The language of Lord *Coke* in his *Institutes*, and the language of the Court in *Mitton*'s case, apply in every respect to such officers as the custos rotulorum and clerk of the peace, whose case is now under consideration; and with respect to the principle of new offices being to be governed by the rules of the common law, I would refer to the case of *Wilkes* v. *Williams*. (*a*) That was an action on promises, and the Defendant pleaded in abatement, that he was a tipstaff of the Court of Chancery, and then he says, that there is an ancient custom in the High Court of Chancery, time out of mind, that all the resident officers, clerks, and ministers of the same Court of Chancery shall be freed and quieted as anciently used to be, according to the liberties and privileges of the Court immemorially used, and ought not to be impleaded elsewhere than before the Chancellor or Keeper of the Great Seal; and on a demurrer, objections were taken, amongst others, to the plea: it was stated to be pleaded as an exemption to offices created within time of memory; as to which the Court held, that such a custom might well extend to newly-created offices; for when an imme-

(*a*) 8 *T. R.* 31.

morial

1829.

HARDING v. POLLOCK.

morial privilege is claimed for all the officers of the Court, and some offices are made within the time of legal memory, they must also fall within the privilege. So I say here, that if the common law allows ancient courts and superior officers to appoint their clerks and subordinate officers, the same common law principle applies to new courts and newly-created offices.

The precise origin, either of the custos rotulorum or of the clerk of the peace, does not appear to be very well known. There were at the common law persons who were called conservators of the peace. Some of these were such by virtue of certain offices which they held; others appear to have been elected. The precise nature and extent of their functions do not appear clearly defined, nor whether they had a clerk to enrol and enter their proceedings, nor how that clerk was appointed. These conservators were discontinued, and the mode in which the constitution of the conservators of the peace was changed and the present justices of the peace were constituted, will be seen in *Lambard's Eirenarcha*, *c.* 4. *p.* 1. Several acts of parliament were made in the time of *Edw.* 3., viz. 1 *Edw.* 3. *st.* 2. *c.* 16., 4 *Edw.* 3. *c.* 2., 18 *Edw.* 3. *st.* 2. *c.* 2., and 34 *Edw.* 3. *c.* 1., and the origin of the justices of the peace, as at present constituted, is to be found in these statutes, and, consequently, within time of legal memory; and it may be considered that the last of these was more particularly that which decided the character and constitution of the present justices. These justices at large had at first the custody or keeping of the rolls, and even still they have them in point of law, as all certioraries and writs of error are directed to them. No mention is made in any of these acts of *Edw.* 3. of any such officer as custos rotulorum — and it is not very clear when he was first constituted — nor of any such office as clerk of the peace. But by the 12 *Rich.* 2. *c.* 10. the clerk of the

the justices shall have 2*s.* a day for his wages, and the clerk of the justices I take to be the present clerk of the peace; and in 11 *Hen.* 7. *c.* 15. the custos rotulorum is mentioned as being authorised to have the oversight of the sheriffs in the cases mentioned. And it seems from the reference in *Lambard*, 40. that there was such an office as custos rotulorum as early as the 14 *Rich.* 2. It does not appear whether previously to that time there was any such person as the custos rotulorum; and if there was not, the justices would, as incident to their office, have a right to appoint their clerk according to the rules of the common law.

But as soon as the justices became a distinct court, it would be inconvenient that the records should be dispersed amongst them promiscuously, and not kept together in one place. Lord *Holt*, in *Harcourt* v. *Fox*, says he looks upon it it was in the power of the king to appoint some particular person to have the custody and charge of the records, and that he should be a person responsible to the justices for the safe keeping of them; and he says this was thought convenient, for the words at the end of the commission of the peace are, "We appoint you to be keeper of the records and rolls of the county." He goes on to say, "This seems to me to be the commencement of the office of the custos rotulorum; for no one being more in commission than another, it was in the power of the king, by his prerogative, to appoint one to keep the records. But, therefore, it does necessarily follow that no person whatsoever could be custos that was not a justice of peace in commission." Then Lord *Holt* goes on to consider how the custos came to appoint the clerk of the peace. He says, "The custos names him for this reason, because the rolls and records of the sessions being by the commission put into the custody of the custos rotulorum, the clerk being the

1829.

HARDING v. POLLOCK.

person that must be trusted with the rolls to make entries upon, to draw judgments, to record pleas, to join issues, and enter judgments, then by common right and by the common law of the land it belongs to him that hath the keeping of the records to nominate this clerk, and not to any one else; and it would be the most inconvenient thing in the world that the custos rotulorum, being intrusted with the custody of the records by his commission, any other should be made clerk of the peace for the actual possession of these records than such a one as he should appoint, when upon any loss or miscarriage he is answerable for it himself to the king and to the subject."

This reasoning of Lord *Holt* as to the propriety of the person who has the records of a court intrusted to him appointing a subordinate officer to take care of them, is certainly extra-judicial; but it falls in precisely with what is said by Lord *Coke* in his 2d *Inst.* commenting on the statute of *Westminster*, 2d, as to clerks of assize, and the language of the Court in *Mitton's* case.

This conjecture of the origin of the clerk of the peace's being appointed by the custos rotulorum is called in question, first, because in 12 *Rich.* 2. *c.* 10. he is called clerk to the justices; secondly, because *Lambard*, in his *Eirenarcha*, at p. 377. calls him, in conformity with the stat. of *Rich.* 2., clerk to the justices, and not as the clerk of the custos rotulorum only; thirdly, because in the Year-book, 2 *Hen.* 7. fol. 1. he is called the clerk and attorney of the king. He is in the statute of *Rich.* 2. called clerk of the justices. It does not appear that there was then any custos rotulorum; but admitting there was, and taking the assertion of *Lambard* that at the time he wrote he was clerk to the justices, it does not follow that he is to be appointed by the justices. The justices form the Court, and therefore he may with propriety be called their clerk, because he is to record their proceedings, and it is his duty to attend the Court.

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My Lords, it is to be observed also that the legal custody of the rolls and records is in the justices, though the actual custody is in the custos rotulorum, who is to produce them at the sessions, and upon other proper occasions to the justices; and therefore there is no more inconsistency in calling him clerk to the justices, when he is appointed by the custos rotulorum, than there is in saying that the rolls are in the legal custody of the justices, though the actual custody is in the custos by virtue of the king's commission. But if *Lambard*'s authority is to be taken, that at the time when there was a custos the clerk of the peace was the clerk of the justices, his authority must be taken altogether, and in the next paragraph he says, "Howbeit" (as much as to say notwithstanding he is clerk to the justices), "the nomination and appointment of him hath long time belonged to the custos rotulorum. And this office was also for a time given by the king's letters patent for term of life, as that of the custos rotulorum was, until the stat. of 37 *Hen.* 8. *c.* 1. recontinued the ancient order of giving it by the custos rotulorum only." He therefore considers that the ancient order of giving it was in the custos.

Then, as to his being called in the Year-books clerk and attorney of the king, nothing can be inferred against the right of the custos from that: if he is to enter the proceedings on the rolls and records, he is, as far as that applies to entries in which the king is concerned, the clerk and attorney for the king; but that has nothing to do with the right of appointment. The officer on the circuit, who in common parlance is called clerk of assize, is really the *clerk of the assizes* and *clerk of the crown*, and is so called in his grant of office.

The statute of *Westminster* speaks of the justices within circuits appointing their clerks to enrol pleas pleaded before them, in general terms; and when his

1829.
HARDING v. POLLOCK.

duties come to be specified, he is called clerk of the assizes and clerk of the crown; that is, he is the clerk of the assizes as to those things which relate to civil suits, and clerk of the crown as to those things which relate to the crown.

It is not material to consider in what relation he stood to the custos, whether he is his deputy or his clerk, or the clerk to the body of justices for whom the custos keeps the rolls and records; but the question is, in whom is the right of appointment? He cannot be considered as the deputy of the custos in the legal sense of the word, because a deputy may perform all the duties of the principal, which the clerk of the peace cannot. Besides the case of *Harcourt* v. *Fox*, there is the case of *Saunders* v. *Owen*. That was an assize of novel disseisin in the office of clerk of the peace. The case turned upon the manner of the appointment, because at that time there was no doubt about the right of the custos to appoint. In the report of the case in *Salkeld*, the Court say that it always belonged to the custos rotulorum to nominate the clerk of the peace; but the clerk of the peace was removable whenever the custos rotulorum was removed or changed, and moreover was removable at the will of the custos till the 32 *Hen.* 8., which makes him continue in *quousque* the custos shall continue in. This, therefore, is a declaration of the Court as to the original right of the custos, which also considered that the effect of the stat. of 37 *Hen.* 8. only altered the period of the duration of the office. In *Jenkins*, 216. *pl.* 59. it is stated that the custos rotulorum appoints the clerk of the peace. In *The King* v. *Evans*, 4 *Mod.* 31., the custos rotulorum was displaced, and the clerk of the peace refused to deliver the rolls to the new custos. He was indicted and found guilty, and removed from his office, and brought a mandamus to be restored. It had been said he was a ministerial

ministerial officer to the custos, and ought to deliver the records to him at the end of the sessions. The Chief Justice said "the clerk of the peace ought to make out all the process, which cannot be done without the rolls. When they are completed, he must deliver them to the custos; but so long as they are in process, they are to be with the clerk of the peace; and therefore it seemed reasonable that the Defendant should be restored;" but three Judges were of a contrary opinion. This case does not seem to prove much either way as to the right of appointment, but only as to the conduct of the clerk of the peace, and that the custos might require the rolls to be delivered to himself if he thought fit; of which there could be no doubt. The case is also reported in 1 *Show.* 262. and 12 *Mod.* 13. In the latter case *Holt* says the custody of the rolls belongs to the custos rotulorum: the clerk of the peace is a distinct officer, and not a mere servant. A peremptory mandamus was ordered.

Then it is material to consider whether the statute of 37 *Hen.* 8. *c.* 1. throws any light upon this subject. It begins, "Where before this time the Lord Chancellor of *England* for the time being hath, by reason of his office of the chancellorship, the nomination and appointment of the custos rotulorum, and that in like manner all and every person which hath had and enjoyed the said office of the custos rotulorum hath had until now of late the nomination and appointment of the clerk of the peace; and whereas now of late divers and sundry persons not having learned, nor being able for lack of knowledge to exercise the offices of custos rotulorum and clerk of the peace, have, of late years, by labour, friendship, and means, attained and gotten for term of their lives, of the king's majesty, several grants by his highness's letters patent to them made of the said clerkship of the peace:" and then it goes on to enact

1829.

HARDING v. POLLOCK.

how these offices shall be appointed to in future; and, as to the clerk of the peace, that he shall be appointed by the custos. Further acts of parliament have since been passed as to these offices, but they are not material to the enquiry. This recital then appears to contain a direct recognition of the right of the custos rotulorum to appoint the clerk of the peace. It says that the custos hath had until now of late the nomination and appointment. That must mean the rightful nomination and appointment. And then it goes on to give the custos a distinct power of appointment to hold the office as long as he should continue custos.

It may, however, be said that this act cannot be taken to recognize any pre-existing right in the custos, because it says that the Lord Chancellor had, by virtue of his office, the nomination and appointment of the custos, and which he had not by law. I admit that he had it not by law; the only way to account for this recital in the act is, that in point of fact he had exercised the right; and which he probably had done because he made out the commission, and he might consider that it was proper for him to direct who were to keep the records. But, at all events, there is a parliamentary recognition that the crown had not appointed the clerk of the peace at the first formation of the court of the justices, because it says that the custos rotulorum had until now of late appointed the clerk of the peace, and that now of late persons had got grants from the crown; and of course it follows that at the first formation the crown had not exercised the right; and that being so, the title of the crown cannot be supported; and then it becomes a question whether the nomination be in the justices at large or in the custos rotulorum.

It may be said there are a great many offices in courts of justice where the power of nomination is not as is con-

contended for by the plaintiff in error. No doubt many are in the crown: as to which I consider that the right of nomination was waived by the crown on the original formation of the court. In others it is in the Chief Justice; and, as to them, I consider that the right of the Chief Justice is founded in prescription, which has taken it away from the Court at large. And there are subordinate officers or clerks who are appointed by the superior officers. In the case of *Scroggs* v. *Coleshill*, the office of exigenter became vacant in 1558, and afterwards Sir *Richard Brooke*, Chief Justice of the Common Pleas, died, and during the vacancy of both offices Queen *Mary* granted the office of exigenter to *Coleshill*, and afterwards granted the office of Chief Justice to *Anthony Brown*, who refused to admit *Coleshill*, and granted the office to *Scroggs*. And then in 1 & 2 *Eliz.* the rights of the parties were discussed, and it was held by the Judges present, viz. the Judges of the King's Bench and the Chief Baron, the Judges of the Common Pleas being excluded, that the title of *Coleshill* was null, and that the right of the office by no means and at no time belongs or can belong to the Queen, but is only in the disposal of the Chief Justice for the time being, as an inseparable incident belonging to the person of the Chief Justice by reason of prescription and usage. At the end of the case a reference is made to the statute of *Westminster*, and it then goes on:—"And so it seems in reason that the justices were before the clerks, and made clerks at their pleasure." In this case the title of the Chief Justice stands upon usage and prescription, and very properly so, because by the common law the right to appoint the officers of the Court was in all the Judges of the Court, and the Chief Justice alone could only appoint by usage and prescription. But the case is important in this point of view, that it says the gift of the office by no

1829.

HARDING v. POLLOCK.

means and at no time belongs or can belong to the Queen; and the question then, I apprehend, was between the right of the whole Court and the right of the Chief Justice, which latter could only be founded by prescription.

The next case to that of *Scroggs* v. *Coleshill* is in *Dyer*, 176 *a.*, by which it appears that the office of chirographer and of custos brevium in the Common Pleas both belong to the king. The next case is that of the *Duchess of Grafton* v. *Hall* (*a*), and *Bridgman* v. *Hall*, in *Shower's Parliamentary Cases*, 111. That was a question between the crown and the Chief Justice of the King's Bench, as to the right of appointing the chief clerk of the King's Bench. The Chief Justice claimed the right by prescription; and one question was, whether the prescription was interrupted by an act of parliament of 15 *Ed.* 3.: but the right of the Chief Justice was put on the point of prescription, and not upon the common law right, for that would have given it to the whole Court.

Another question is, whether this right of nomination is not a matter of fact to be decided by a jury, rather than as a matter of law. But I think it is a question of mere law for the reasons I have given. The only thing that could be considered as a matter of fact to be tried by a jury, would be, whether the crown had reserved the right of nominating the clerk of the justices, or whatever he may be called, at the time when the first commission issued for appointing justices of the peace; and I think that courts of law may take judicial notice that they did not do so, from a total absence of any thing appearing to countenance such a supposition, and from the language of the stat. of 37 *H.* 8., where such exercise, in fact, is distinctly negatived, and from the

(*a*) *Skin.* 345.

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various authorities which I have referred to as to the office in question, in none of which is it in any way supposed that the crown did exercise such a right in the first instance.

It may be said, that in the counties palatine a different rule prevails; that in the county palatine of *Lancaster* the clerk of the peace is not appointed by the custos rotulorum; and that in *Durham* the bishop does not appoint in the character of custos rotulorum. Whatever is done in the counties palatine is not necessarily according to the rule of the common law, but it depends altogether on the particular constitution of each county, as it was originally formed by act of parliament or otherwise; and I do not consider that what has been done in counties palatine can affect the general principles of the common law.

I am therefore of opinion, on the first question, that the appointment to the office of clerk of the peace within the shires of *England* did by law, previously to the passing of the act of 37 *H.* 8. *c.* 1., belong of right to the custos rotulorum of the shire, by virtue of his said office.

The law of *Ireland* before the time of *H.* 2. was the *Brehon* law. King *John*, in the 12th year of his reign, is said in *Co. Lit.* 141*a.*, to have gone into *Ireland*, and there, by the advice of grave and learned men in the laws, whom he carried with him, to have ordained and established that *Ireland* should be governed by the laws of *England*. Some of the *Irish* accepted, but others objected to this. In the parliament of *Kilkenny*, 40 *Edw.* 3., the *Brehon* law was abolished. In *Poyning's Law*, 10 *H.* 7., it is stated that *English* statutes before that made in *England* shall be in force in *Ireland*. Whatever, therefore, were the rights of the crown, or other persons in *England*, at the formation of the courts of justices in *England*, were also the rights of the corresponding persons in *Ireland*.

No

1829.

HARDING v. POLLOCK.

No act of parliament in *Ireland* before the year 1800 took away the rights of the custos. I am of opinion, therefore, on the second question, that the appointment of the office of clerk of the peace within the shires of *Ireland* did by law, in and previously to the year 1800, belong of right to the custos rotulorum of the shire, by virtue of his said office.

The appointment of the *King's County* was, by 3 & 4 *Ph. & M. c.* 2. *s.* 3. A new county, with all the officers attached to it, will follow the rule of all other counties; and if the crown, at the time of the original formation of the court of the justices in *England*, did not exercise the nomination and appointment of the officers, it could not do so in *Ireland*, either when the court of justices was first formed there, or at the time of the formation of the *King's County*. The clause is as follows: — "And be it also enacted, by the authorities aforesaid, that the new fort in *Offaily* be from henceforth for ever called and named *Phillipstown*, and that the said countrie of *Offaily*, and such portion of the said *Glinmalry* as standeth and is situated of that side of the river of *Barrow*, whereupon the said *Phillipstown* standeth and is situated, and all the seigniories, honors, manors, lands, tenements, and hereditaments of the same country and portion, and every of them, be from the feast of *St. Michael* the *Archangel*, next coming after the first day of this present parliament, one shire or countie, named, known, and called, the *King's Countie*; and shall from the said feast be taken, reputed, and used as a countie or shire to all purposes for ever; and that there shall be appointed, ordained, and made, within the said countie or shire, for the rule thereof, and execution of things there, sherife, coroners, escheator, clerke of the market, and other officers and ministers of justice, yearly, as in other the shires or counties of this realm of *Ireland* be or should be."

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1829.

HARDING v. POLLOCK.

I am therefore of opinion, as to the third question, that the right to appoint to the office of clerk of the peace within the *King's County* of *Ireland* did, by law, in and previously to the year 1800, belong to the custos rotulorum of the said shire, by virtue of his said office.

GASELEE J. My Lords, as I have reason to believe that all my learned brethren who are now present, with the exception of one only, will concur in the answers which have been given by my learned Brother who has preceded me, to the several questions propounded by your Lordships, and as he has entered so fully and ably into the investigation of the grounds and reasons on which he has founded those answers, I think it is not only unnecessary, but that it would be an inexcusable waste of your Lordships' time were I to enter into any lengthened discussion upon the present occasion. I shall, therefore, content myself with saying, generally, upon the first of these questions, that it appears to me clearly that the act of parliament referred to is a declaratory act, and that upon an attentive consideration of that act, and the several authorities which have been cited and commented upon by my learned Brother, I am of opinion, that the appointment to the office of clerk of the peace within the shires of *England*, did by law, previously to the passing of the act of 37 *H.* 8. *c.* 1., belong of right to the custos rotulorum of the shire by virtue of his said office.

Upon the second question, in the absence of any means of ascertaining precisely the course adopted upon the introduction of the sessions and of the offices of custos rotulorum and clerk of the peace into the kingdom of *Ireland*, the natural presumption is, that it would be that which had been pursued in *England*.

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1829.

HARDING v. POLLOCK.

But it does not rest on presumption only: the three cases of *The King* v. *Ferguson*, and *The King* v. *The Justices of the Peace of the County of Tipperary*, and *The King* v. *Severney and Falkiner*, clerk of the peace in the said county, cited in the Appendix to the case of the Plaintiff in Error, appear to me to be decisive authorities in support of the right of the custos rotulorum: it is clear also that the grant under which the Defendant in Error claimed, which is a grant of the office of clerk of the peace of the whole province of *Leinster*, of which the county of *Longford* and also the *King's County* are members (except *Kilkenny*), is dated 30th *July* 1798; and that seven months after the date of that grant the right of *Ferguson* to the office was established. I am, therefore, of opinion that the appointment to the office of clerk of the peace within the shires of *Ireland* did, by law, in and previously to the year 1800, belong of right to the custos rotulorum of the shire by virtue of the said office.

Upon the third question, I do not see any sufficient ground for making a distinction between the *King's County* and the other shires of *Ireland*.

The act of parliament constituting the *King's County* does not make any. The clause is very short; it enacts that certain portions of land therein described shall be one shire or county named and called the *King's County*, and shall be taken, reputed, and used as a county or shire to all purposes for ever.

It goes on to add, that there shall be appointed, ordained, and made within the said county or shire, for the rule thereof and execution of things there, sheriffs, coroners, escheators, clerks of the market, and *other officers and ministers of justice* yearly, as in other the shires or counties of this realm of *Ireland* be or should be.

It might perhaps be sufficient to say, that the clerk of

of the peace is one of the officers and ministers of justice. But in addition to that, the case of the county of *Monmouth* is strictly analogous to the present, the statute making it an *English* county. It says nothing of a custos rotulorum, yet he is appointed and appoints the clerk of the peace in the same manner as is done with other *English* counties. It is made an *English* county by 27 *H.* 8. *c.* 26. I do not find that there was any custos rotulorum of any of the *Welsh* counties until after that period. The 27 *H.* 8. *c.* 5. authorizes the making justices of peace within *Chester* and *Wales.*

By the 34 & 35 *Hen.* 8. *c.* 26. intituled, an act for certain ordinances in the king's dominions and principality of *Wales*, reciting, that there were twelve shires in *Wales*, eight old ones and four new, by 27 *Hen.* 6. besides *Monmouth*, it enacts, *s.* 53. that in each of the twelve shires there shall be justices of the peace and *quorum*, and also one custos rotulorum; and by *s.* 54. that the said justices of the peace, justices of the quorum, and custos rotulorum shall be named and appointed by the Chancellor of *England* by commission under the king's great seal of *England.* It takes no notice of the clerk of the peace, who, I believe, is constantly appointed by the custos rotulorum, as in the *English* counties.

With respect to the length of time during which the crown appointed the clerk of the peace in the king's county, I observe, that in the case of *The King* v. *Falkiner*, it appeared the crown had appointed the clerk of the peace in *Tipperary* for a very considerable period, but notwithstanding that, the right was held to be in the custos rotulorum.

I therefore state it to your Lordships as my humble opinion, that the right of appointment to the office of clerk of the peace within the *King's County* in *Ireland* did

1829.

HARDING v. POLLOCK.

did by law in and previously to the year 1800 belong to the custos rotulorum of the shire by virtue of his said office.

VAUGHAN B. With reference to the last two questions, it is to be considered as admitted that the crown, if it ever possessed the right of appointment to the office of clerk of the peace within the shires to which these questions refer, has never parted with that right, unless it passed to the custos rotulorum in each county merely by virtue and in right of his said office of custos rotulorum.

To the first question, my Lords, I answer, that the office of clerk of the peace within the shires of *England* did, by law, previously to the passing of the act of 37 *Hen.* 8. *c.* 1., belong of right to the crown. The king by prerogative has the creation of all powers and offices in the state, especially those connected with the administration of justice. Whoever, therefore, insists on the right to appoint to any such office must, to establish a legitimate claim, derive his title through the crown. But I apprehend this may be done either, first, by grant from the crown; secondly, by prescription, which presupposes such grant; thirdly, by act of parliament, to which the king is a consenting party. It is not argued, nor is there colour for contending that the appointment to the office of clerk of the peace rests on any act of parliament as its foundation prior to the 37 *Hen.* 8. Nor can the docrine of prescription, in the legal acceptation of that term, assist the claim, because neither the office of custos rotulorum nor of clerk of the peace has any existence before the time of legal memory. The case of the Plaintiff in error must depend, therefore, on the question, whether the right of the custos to appoint can be derived from any grant mediately or immediately from

from the crown; and on this ground I conceive it may be defended. When I use the words mediately or immediately, I would be understood that the right to appoint to the office of clerk of the peace may be derived through the crown by the grant of some other office to which it may be inseparably incident, and that it did of right belong to the office of custos rotulorum to appoint to the office of clerk of the peace in *England*, not by virtue of any express grant from the crown, but as incidental to the office of custos rotulorum prior to the statute of 37 *Hen.* 8. *Accessorium sequitur principale.* It passes as an accessory to its principal.

I think, my Lords, that can be shewn by a consideration, first, of the origin and nature of the respective offices of custos rotulorum and clerk of the peace, and of their relative duties as arising out of and connected with the commission of the peace; secondly, by the strongest legislative declarations and recognitions on the subject; thirdly, by the authority of solemnly-adjudged cases, some of which appear to me to be strictly analogous; and by the declarations and opinions of the most eminent Judges. And first as to the origin (as far as it can be traced) and nature of the respective offices and their duties as connected with the commission of the peace.

My Lords, it is difficult to fix with any precision the period when any of these offices were first created. Their origin is involved in obscurity; and if the attempt to discover it eluded the researches of the eminent Judges, who must have employed many watchful hours in this enquiry in the reign of *William* III. — I allude to the case of *Harcourt* v. *Fox*, — the subsequent lapse of 130 years has only enveloped the subject in darker mystery. That the office of custos rotulorum is not an immemorial one must be conceded, because the commission

1829.

HARDING v. POLLOCK.

mission of the peace, which gave birth to it, is within the time of legal memory; but that it is a very ancient office will not be disputed. In what manner the peace was maintained in very ancient times, and before the reign of *Edward* III., whether by persons under the name of conservators; whether some of them (for example) the king's justices and inferior judges and ministers of justice, as sheriffs, constables, tithingmen, headboroughs, and the like, were *ex officio* wardens of the peace; whether others were entitled to hold the same office by tenure or prescription; whether others were elected in full county court in pursuance to a writ directed to the sheriff for that purpose; whether others again were occasionally appointed by a committee of the crown; what was the extent of their authority, and what the precise limits of their jurisdiction, — are questions which it might gratify a spirit of antiquarian curiosity to investigate, but from which investigation I conceive no clear light would be reflected to guide us in our present enquiry.

Before the reign of *Edward* III. it should seem that commissions of the peace were not confined within the limits of particular counties, nor addressed exclusively to persons resident within them: their authority, however, was restrained strictly *ad conservandam pacem.*

As soon as ever *Edward* III. ascended the throne, which became vacant by the imprisonment, deposal, and murder of his father, the statute of 1 *Edw.* 3. *c.* 16. was passed, intituled, "who shall be assigned justices and keepers of the peace;" and containing this simple enactment. "*Item.* — For the better keeping and maintainance of the peace, the king wills, that, in every county good men and lawful, which be no maintainers of evil nor barrators in the county, shall be assigned to keep the peace." This short and general act gave very limited authority to the persons to be appointed under

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it, making them nothing more than conservators of the peace nominated by the crown, in addition to those who were already such by the pre-existing laws and usages of the realm. Within three years afterwards, these justices and keepers of the peace were entrusted with somewhat more enlarged powers, being invested with the additional authority to take but not to try indictments. The statute of *Edw.* 3. *c.* 2., after some regulations respecting the appointment of justices of assize and gaol delivery, ordained that there should be assigned good and lawful men in every county to keep the peace; and the justices assigned to deliver the gaols had power given them to deliver the gaols of those that should be indicted before the keepers of the peace; and such keepers were directed for that purpose to send their indictments before those justices. After this statute I find no material alteration in their authority until the eighteenth of the same reign, when they were to be empowered by a commission from the crown (if need should be) "to hear and determine felonies and trespasses," 18 *Edw.* 3. *c.* 2. Title—"Justices of the peace shall be appointed, and their authority." *Item.*—"That two or three of the best of reputation in the counties shall be assigned keepers of the peace by the king's commission; and at what time need shall be the same with other wise and learned in the land, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same county, and to inflict punishment reasonably according to law and reason, and the manner of the deeds." When in obedience to this statute it was prayed by the Commons, in the twentieth year of the same reign, that they might have a power to hear and determine felonies, it was answered, that the king would appoint learned persons for that office.

1829.

HARDING v. POLLOCK.

So in the twenty-first year of the same monarch, the commons being charged to advise the king what was the best way of keeping the peace of the kingdom, they recommended that six persons in every county, of whom two were to be *de plus graunds*, two knights, and two men of the land, and so more or less as need should require, should have the power and commission out of Chancery to hear and determine the keeping of the peace.

In conformity with these petitions and statutes, and others which may be seen in *Cotton's Extracts* from records in the Tower, commissions were at various times framed, assigning certain persons to execute the powers which the statutes authorised the king to confer; in which, in addition to the general powers for keeping the peace, a special charge was introduced to enforce the observance also of particular statutes, viz., the statutes of *Winton*, 2 *Edw.* 3., and the statute of *Northampton*, 20 *Edw.* 3., with some others.

But the general standing authority given to the justices to hear and determine felonies and trespasses, thereby constituting them complete judges of a court of record, was not conferred upon them until the 34 *Edw.* 3. *c.* 1., and I conceive that statute gave occasion to the commencement of the office of custos rotulorum, and the necessity of appointing an office to make and keep the rolls or records of the peace, naturally arising out of the execution of this commission, so much enlarging their jurisdiction and powers. Observe the title and language of the stat. 34 *Edw.* 3. *c.* 1.: — "What sort of persons shall be justices of the peace, and what authority they shall have." The act states, first, "In every county in *England* shall be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy in the county, with some learned in the land,

land, and they shall have power, &c. And also to hear and determine, at the king's suit, all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid."

I have endeavoured to trace the rise and progress of the growing authority and jurisdiction of the justices of the peace, with a view to ascertain whether they had power to hear and determine felonies and trespasses until the 34 *Edw.* 3., and consequently were a court of record before that time; because, if I am correct in supposing they had no such authority, there was no necessity for any such officer as custos rotulorum or clerk of the peace, nor do I believe either of them to have existed in fact prior to that period. But a court of record being then organized, and the justices assembled for the first time under the commission directed by that statute, I apprehend it would of right belong to them, as incident to the administration of their justice, having records which must be in their custody, to appoint an officer, by whatever name he might be called, whether clerk of the crown, clerk of the justices, or clerk of the peace, to assist them in drawing their indictments, in arraigning their prisoners, in joining issues for the crown, in entering their judgments, in awarding their process, and in making up and keeping their records.

The nature of these duties may sufficiently account for his being sometimes called not only clerk of the peace, but also clerk and attorney for the crown; *Year Book*, 2 *Hen.* 7. *p.* 31. *pl.* 2.; where a question arose whether all the justices of the peace ought to bring their recognizances to that justice who was custos rotulorum: all agreed it was good so to order it, and well done; and the clerk of the peace at the sessions is there described as clerk of the peace, who is clerk and attorney for the advantage of the king.

In *Harcourt* v. *Fox*, as reported in 4 *Mod.* 173.,

1829.
HARDING v. POLLOCK.

and in *Holt's Reports*, 189., the Court is reported to have affirmed that the first beginning of a custos rotulorum was in the 34th year of the reign of *Edw.* 3., and that the reason why he was appointed at that time was, because the justices of the peace could not then agree among themselves who should keep the records; and that upon application made to the king concerning the matter, his majesty (to prevent all disputes) appointed a fit person to keep them, and gave him the custody of the records in every county. But, my lords, from very careful perusal of what may perhaps be considered as a more full and accurate report of the same case in 1 *Shower*, where the opinions of the judges are reported *seriatim*, I do not collect with certainty that the custos rotulorum was nominated by the crown so early as in the 34th year of the reign of *Edw.* 3. Lord *Holt* indeed observes, "That that statute gave occasion to the commencement of the office of custos rotulorum; for the justices being judges of record, the records of that court must be in their custody. But as it might be inconvenient that the records should be dispersed amongst them promiscuously, and not kept together in one hand, it was in the power of the crown to appoint a particular person to have the custody and charge of them." Such is the language ascribed to Lord *Holt* by the report in *Shower*; but at what precise period of time the king first exercised that power, whether on the issuing of the first commission after the 34 *Edw.* 3., or in consequence of the supposed disagreement stated to have arisen amongst the justices themselves, does not distinctly appear in the judgments of any of the judges, and I incline to the opinion that it was not until a later period.

To hazard any conjectures on the subject is (to adopt the phrase used in the argument of *Harcourt* v. *Fox*, *ambulare in tenebris*; but whatever cloud may obscure this

this enquiry, my researches have led me to conclude, that in a short succession of years subsequent to the 34 *Edw.* 3. the king introduced the clause now found in every commission of the peace, containing a special designation of the custos rotulorum by name. This fact is manifested from several passages in *Lambard*, who, in page 40. of his valuable work, says, "That the earliest commission extant, expressly appointing by name the individual to whom the custody of the records of the peace was committed by the crown, was in the fourteenth year of the reign of *Richard* II." In mentioning the alterations made in the terms of the commission of the peace, he adds, "And *Stephen Beteman* was then the first for *Kent*, to whom the credit of the records of the peace was thereby committed, which officer is now since then called the custos rotulorum; all which matters you may find in the records, 28th of *June*, 14 *R.* 2. part 2. membrana 35."

From whence I infer, that although during the interval between the 34 *Edw.* 3. and the 14 *R.* 2., comprising a period of about thirty years, the justices generally had the custody of the records, and, as incident to that custody, the appointment of any ministerial officer to assist them in that duty (by whatever name he might be called); yet when, in progress of time, whether from differences arising between the justices themselves, or from any other cause, the crown appointed the custos rotulorum by name (a course of proceeding, which, according to *Lambard*, obtained from the 14 *Rich.* 2.), that appointment, in my judgment, drew after it as incidental to it the nomination of the clerk of the peace, by reason of his possession and custody of the records. It is true, there is no mention of clerk of the peace by that precise name until some time after the statute 12 *Rich.* 2. *c.* 10., which recognizes an officer as ministerial to the justices in the discharge of their duties at

1829.
HARDING v. POLLOCK.

the sessions, under the denomination of their clerk. The clause to which I refer is that which directs that every of the said justices shall take for their wages four shillings the day, for the time of their sessions, and their clerks two shillings; but I conceive there is nothing in that statute to negative the presumption that the officer therein described as clerk of the justices was, in fact, clerk of the peace; because, whether called clerk of the justices of the peace, or, by abbreviating the expression, clerk of the peace, the same individual officer performing the same duties, is clearly designated.

Indeed, in the thirteenth year of the reign of *Hen.* IV., the reign immediately succeeding that of *Richard* II., and within twenty years of the period of time when the crown had introduced into the commission of the peace the name of an individual justice as the keeper of the rolls, I find the clerk of the peace described in the year-books 13 *H.* 4. p. 10. pl. 30. as clerk of the sessions of the peace; for it is there stated, that at a gaol delivery in the castle of *Sarum*, one of the justices, *Hawkes*, addressing himself to *Horn*, who was clerk of the sessions of the peace, directed him to take down the name of the prisoner who was not then indicted, that he might be enquired of at the next sessions of the peace.

I now, my Lords, proceed to the consideration of the question, Whether there be not on the rolls of parliament a direct legislative recognition of the right of the custos to appoint the clerk of the peace, and beg leave to refer to the statute 37 *H.* 8.

In my humble judgment, the language of the statute is plainly declaratory of the right of the custos by law to appoint to the office of clerk of the peace; nor can I conceive that the law-officers of the crown, whose duty it was to protect the rights and interests of his majesty, would have permitted such a preamble to have stained the rolls of parliament, unless they had regarded the recent

recent grants by his highness's letters-patent of the clerkship of the peace as an encroachment and usurpation upon the ancient legitimate right of the custos to appoint by virtue of his office. The immediate occasion of passing that statute will appear from the language of the preamble:—"Whereas before this time the Lord Chancellor, by reason of his office, (hath) had the nomination and appointment of custos; and that in like manner (that is, by reason of his office and incident thereto) all and every person which had and enjoyed the said office of custos, hath had until now of late the nomination and appointment of clerk of the peace;" then it goes on to recite the mischiefs resulting from the nomination of persons not sufficiently learned to exercise the said offices, by reason whereof indictments for felony and murder, and other offences and misdemeanors, and the process awarded upon them have not only been frustrate and void, sometimes by negligent engrossing, by the embezzling or rasure of the same indictments, but also sundry bargains and sales have also been void for lack of sufficient enrolment of the same.

Some of the duties of custos rotulorum are here enumerated; *viz.* the drawing of the indictments for felonies and other offences; the keeping of them, and the awarding of process upon the same; and the enrolment of bargains and sales. That these duties extend as well to the proper making as to the keeping of the records cannot be disputed; for if the naked custody of them, without regard to their due entry and enrolment, were the only office required from the custos or his agent, the lack of sufficient knowledge could not have been urged as the mischief which called for a remedy. From this act, therefore, I conceive the inference almost irresistible, that the clerk of the peace had at all times until recently, before the passing of it, been appointed

1829.

HARDING v. POLLOCK.

by the keeper of the records. In this opinion I am fortified by great authorities. *Lambard*, in commenting upon this statute, p. 378., after observing that the nomination and appointment of clerk of the peace had long time belonged to the custos rotulorum, adds,— "And this office was also for a time given by the king's letters-patent for the term of life, as that of the custos was, until the second stat. of 37 *H.* 8. *c.* 1. recontinued the ancient order of giving it by the custos rotulorum only."

Is it possible for language to express in terms more clear, appropriate, and forcible, the opinion entertained by this author, that this act was declaratory of the legitimate right of the custos to appoint, and of his sense of the usurpation of the crown? *Eyres* J., in the case of *Harcourt* v. *Fox*, as reported in 1 *Show.* 518., in discussing the several provisions of the statute 37 *H.* 8., expresses his opinion that it must be regarded as a declaratory law. He expresses himself in these terms:— "From all which parts of this act so penned, I think it must be obvious to every man's understanding, that this act was but declarative of what the law was before the making of the act." Nor does it appear to me that the argument of its being a declaratory law is at all weakened, or the right of the custos to appoint the clerk of the peace in any manner impugned, by the fourth or fifth sections of the act;—the first of which continued and confirmed all such as (being found when the act passed, in the actual possession of those offices,) had derived their titles to them under any letters-patent or commission from the crown; and the last of which, the fifth section, reserved to the Archbishop of *York*, the Bishop of *Durham*, the Bishop of *Ely*, and every of their successors, the exercise of the same rights which they had been accustomed to enjoy.

The fourth section, my Lords, I think, can be regarded

garded only as the confirmation of a suspicious and doubtful title. For if the king's right to appoint had been clear and unquestionable, where was the necessity of a special enactment to establish it? Nor does the view which I have taken of the character of this monarch induce me to conclude that he would have condescended to compromise an acknowledged right in the crown upon the terms of continuing the then present possessors in office for the period of their lives. As to the fifth section, I am not aware that any argument has been founded upon the construction of this clause unfavourable to the right of the custos. Those jurisdictions are specially excepted from the general provisions of the act. They may or may not have originated in similar usurpations, and it may have been thought expedient to confirm the Archbishop of *York*, the Bishop of *Durham*, and the Bishop of *Ely*, and their successors in the exercise of all the liberties and authorities, according as they had enjoyed the same by the seal of a parliamentary enactment.

My Lords, I cannot close my observations on this statute without remarking, that although the reign of *Henry VIII.* has been considered as a very distinguished era in the annals of our judicial history, yet the royal prerogative was then strained, more particularly in his latter years, to a very tyrannical height, and its encroachments sanctioned (to use the language of the elegant commentator on the laws of *England*) by those pusillanimous parliaments, one of which, to its eternal disgrace, passed a statute, whereby it was enacted that the king's proclamations should have the force of law.

I now propose to shew by cases strictly analogous, and by the opinions and judgments of the most eminent lawyers formed after much consideration, that the appointments of the clerk of the peace may properly be regarded by law as incident to the office of custos. Mr. Justice

1829.

HARDING v. POLLOCK.

Justice *Gregory*, in *Harcourt* v. *Fox*, 1 *Shower*, 523. says, "I do not see but that the clerk of the peace being an officer relating to the execution of the law, his office must be governed by those rules which govern other offices of the like nature." I would, therefore, adopt this mode of illustrating the subject, and refer to the several offices of clerk of assize, of the shire clerk in the county court of the sheriff, of the exigenter of the Court of Common Pleas, and the clerk of the pleas in the Court of King's Bench. I would apply the reasoning by which the right to appoint to those offices was sustained, and the principle to be extracted from them, namely, that law and reason require that the custos should appoint, to the question I am called to answer.

To take first the office of clerk of assize; it is difficult to conceive two offices bearing a stronger resemblance to each other than that of clerk of assize and clerk of the peace. The relation of clerk of the peace to the justices at sessions, is precisely the relation of clerk of assize to the justices of assize: they are the very indenture and counterpart, formed upon the same model, created by the same necessity, and discharging the same duties. By whom is the clerk of assize appointed? By the justices of assize. If it be said that the justices of assize derived their right to appoint from the provisions of the statute of *Westminster*, which transferred it to them from the crown, I would answer that their right is laid in a deeper foundation, not in the statute, but in the common law. For, according to my Lord *Coke*, there exists a common law principle, which, without intrenching upon the prerogative of the crown, gives to the justices of a court the right of appointing such officers as are necessary auxiliaries to them in the discharge of their judicial functions, and for whose qualifications and fidelity they are responsible. This principle is directly recognised by Lord *Coke* in his Commentary upon the statute of *West-*

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minster 2., from which, according to his opinion, the judges of assize had exercised this right long before the existence of that statute. "Habeant de cætero omnes justiciarii de bancis in itineribus suis clericos irrotulantes omnia placita coram eis placitata, sicut antiquitus habere consueverint." Statute of *Westminster* 2d, *c.* 30. 2 *Inst.* 425. "Hereby it appeareth that the justices of courts (generally) did ever appoint their clerks; as here it is put, for example, that the justices of the benches in their circuits had clerks that enrolled all pleas pleaded in them, as anciently they used to have, *i. e.* by the common law." In the next passage he reiterates and confirms the same position, that this branch of the statute declareth it to belong to the justices, and that they had enjoyed the same of ancient time, *i. e.* by common law. Here, then, is a studious disclaimer of the statute of *Westminster*, as being the origin of the right, and an anxiety manifested to prevent any misconception of his clear opinion, that the appointment did of right belong, and was incident to the common law. His reasons for this opinion appear to me conclusive, and his authorities incontrovertible: "and the reason thereof is twofold: First, the law doth ever appoint those who have the greatest knowledge and skill;" secondly, he says that the officers and clerks are but to enter, enrol, or effect that which the justices adjudge, award, or order, the insufficient doing whereof maketh the proceeding erroneous; therefore the law (as it here appeareth) did appropriate to the justices the making of their own clerks and officers, and so to proceed judicially by their own instruments; and this was the common law.

"The king cannot grant the office of clerk of the shire or county clerk, (who is to enter judgments and proceedings in the county court), for that the making of the shire clerk belongeth to the sheriff, of the common law;

1829.

HARDING v. POLLOCK.

law; as in *Mitton's* case, it appeareth, *et sic de cæteris,*" 4 *Rep.* 31. It appears that *Queen Elizabeth* by patent granted the office of county clerk to *Mitton* for life, and afterwards constituted *Arthur Hopton*, sheriff of *Somerset*, who interrupted *Mitton*, claiming the appointment as incident to his office of sheriff, and thereupon appointed a clerk himself of the county court. For *Mitton* it was argued the grant was good, because the county court was the queen's court, and that the queen might, in her own court, appoint a clerk to enter the judgments and proceedings. Secondly, that *A. H.*, who was made sheriff after the patent, could not avoid it, for the sheriff held his office only at the will of the queen, who might determine it at her pleasure, and the queen had granted it to *Mitton* for life. Thirdly, precedents were shewn, by which it appeared that such offices had been granted by King *Henry* VIII.

It was resolved by the two Chief Justices and all the Judges, *nullo contradicente aut reluctante*, that the patent was void in law; that the office of sheriff was an ancient office, before the conquest, of great trust and authority; and although the king appointed the sheriff *durante bene placito*, yet he could not determine in part, nor abridge him of any thing incident or appurtenant to his office. Resolved that the county court, and the entering of all proceedings in it, are incidental to the office of sheriff, and therefore cannot be divided from it. And *Scrogg's* case, 2 *Eliz.*, was cited. The *exigenter's* case was referred to in *Dyer*, 175. as to the third objection.

But for general answer to all objections, it was observed that great inconvenience would ensue to sheriffs, who are great and ancient officers and ministers of justice, if such grants are valid. For that as well the entry of all proceedings in the same court, as the custody of the entries and rolls thereof, do belong to the office of sheriff;

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and if the record be embezzled, the sheriff shall answer for it; and therefore it would be full of danger and damage to sheriffs if others should be appointed to keep the entries and rolls of the county court, and yet the sheriff should answer for them; and therefore the sheriff shall appoint clerks under him in his county court, for whom he shall answer at his peril. And law and reason require that the sheriff, who is a public officer and minister of justice, and who has an office of such eminence, confidence, peril, and charge, ought to have all right appertaining to his office, and to be favoured in law. This is illustrated by the case of *Gaols*, the custody of which of right belongs, and is incident to, the office of sheriff, who must answer for excesses.

Mitton's case recognizes, and was decided upon principles directly applicable to the case of the custos rotulorum; for it does not appear, either from the argument of counsel or from the judgment of the Court, that the right of the sheriff, although a very ancient officer existing before the conquest, was founded on prescription, but on the fact of his being the actual keeper of the rolls and entries of the Court for which he was responsible; and when it is remembered that the sheriff exercised a criminal jurisdiction, the sheriff's clerk might with propriety be considered as much the attorney-general of the king in joining issues for the crown as the clerk of the peace.

In addition to those cases of the clerk of assize and the clerk of the sheriff's court, which appear to be strictly analogous, I would mention the *exigenter*'s case, *Scroggs* v. *Coleshill*, for the principle on which it was decided; *viz.* that the title of *Coleshill* was null, and that the gift of the office at no time belonged to the queen, but was at the disposal of the Chief Justice for the time being, as an inseparable incident belonging to him, and this by reason of prescription and usage. In 1558,

Queen

1829.

HARDING v. POLLOCK.

Queen *Mary*, during the vacancy of the office of exigenter and of Chief Justice of the Common Bench, granted the exigenter's office by patent to *Coleshill*: she afterwards, by patent of same date, granted the office of Chief Justice to *Browne*, who refused to admit *Coleshill*, and appointed *Scroggs*. Sir *Nicholas Bacon* was commanded by the queen to examine the right and title of *Coleshill*, and to report. He convened all the Judges of the Queen's Bench—*Saunders*, Chief Baron, and *Gerard*, Attorney-General, and *Caril*, attorney of the duchy (all the judges of the Common Pleas excluded)—who took a clear resolution that the title of *Coleshill* was null, and that the gift of the office at no time belonged to the queen, but was at the disposal of the Chief Justice for the time being, as an inseparable incident belonging to the said Chief Justice; and this by reason of prescription and usage. *Dyer*, after describing the words of the statute of *Westminster* 2d, *habeant de cætero omnia placita coram eis*, concludes with these words: "and so it seems in reason that the justices were before the clerks, and made clerks at their pleasure."

To this may be added, also, the case of *Bridgman* and *Holt*, in *Shower's Parliamentary Cases*, 111., where the question was, Whether the office of clerk of the pleas in King's Bench was grantable by the crown, or belonged to the Chief Justice, and was grantable by him? This officer was to enrol pleas between party and party only, having nothing to do with any pleas of the crown. All the rolls and records in this office were in the custody of the Chief Justice. All writs to certify and remove the records were directed to the Chief Justice. From the nature of the employment, it was insisted, that in truth he was but the Chief Justice's clerk; and, further, it was shewn that for 235 years, the office when void had been granted by the Chief Justice, and enjoyed accordingly under such grants. And that in those

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1829.

HARDING v. POLLOCK.

grants were introduced these words, after the mention of the surrender to the Chief Justice:—"To whom of right it doth belong to grant that office whensoever it shall be void." This declaration by the party claiming to appoint is weak when compared with the strong legislative recital of the right of the custos to appoint in the preamble of the statute of 37 *H.* 8.

In addition to these authorities, the case of *Harcourt* v. *Fox*, to which I already have had frequent occasion to refer, should never be lost sight of. It is true, the question there to be decided was, Whether, upon the construction of the several acts of 37 *H.* 8. and the first of *William* and *Mary*, the office of clerk of the peace determined by the death or removal of the custos; or Whether, being appointed, he did not acquire under the statutes an interest *quamdiu se bene gesserit.*

In the decision of that question, which arose within five years after the passing of the act, it became an essential part of the enquiry to ascertain the origin and nature of the respective offices of custos rotulorum and clerk of the peace. I cannot, therefore, consider the opinions delivered by Lord *Holt*, and the other Judges upon this branch of the subject as *obiter* and extrajudicial dicta, but bearing pertinently and directly on the point. And although it was insinuated that Lord *Holt*'s mind had insensibly contracted a bias from his connection with one of the litigant parties in another cause unfavourable to the pure administration of justice, yet I am persuaded that his spotless integrity and high judicial character with the present age and with posterity will afford him an ample shield against so severe and undeserved an imputation.

The case of *Saunders* v. *Owen* followed soon afterwards, which establishes the same principles, according to the report of it in *Salkeld*, 467. The Court held that it always belonged to the custos rotulorum to nominate

1829.

HARDING v. POLLOCK.

nate the clerk of the peace, but that he was removable whenever the custos was removed or changed; and, moreover, that he was removable at the will of the custos until 37 *Hen.* 8., which continued him in office *quousque* the custos continued, so that he demeaned himself in his said office justly and honestly.

The point there for decision was, whether the nomination by parol was sufficient, or whether it required an appointment by deed. But I am not aware, although the same case is more fully reported by Lord *Raymond*, that there was any dissatisfaction expressed at the decision of Lord *Holt* in *Harcourt* v. *Fox*, afterwards affirmed in the House of Lords; and under these circumstances, my Lords, after a careful examination of the origin (as far as I have been able to trace it) of the respective offices of custos rotulorum and clerk of the peace, and of their duties, as arising out of and connected with the commission of the peace; from the legislative declaration and recognition of the right of the custos rotulorum to appoint, which, as it appears to me, is to be found on the rolls of parliament, statute 37 *Hen.* 8.; and from the accumulated weight and authority of the cases to which I have referred as analogous, and the principles to be extracted from them, my mind (with great deference to the opinion of others from whom it may be my misfortune to differ) has arrived at the conclusion that the appointment of the office of the clerk of the peace within the shires of *England* did by law, previously to the passing of the act of 37 *Hen.* 8., belong of right to the custos rotulorum of the shire by virtue of his said office.

My Lords, to the second question propounded by your Lordships, Whether the appointment to the office of clerk of the peace within the shires of *Ireland* did by law, in and previously to the year 1800, belong of right to the crown or to the custos rotulorum of the shire by virtue

virtue of his said office, or to any and what other person or persons? I answer, that I conceive it to have belonged of right to the custos rotulorum of the shire by virtue of his office. Your Lordships are aware that as early as the reign of King *John*, a regular code or charter of *English* laws was granted by that monarch about the twelfth year of his reign, and deposited in the Exchequer of *Dublin*, under the king's seal, for the common benefit of the land (as the public records express it), that is, for the common benefit of all who should acknowledge allegiance to the crown. And for the regular and effectual execution of those laws, the king's four courts of judicature were established upon the model of the four superior courts in *England*, and a new and more ample division was then made of the king's lands of *Ireland* into counties, in which sheriffs and other officers were appointed, in accordance with the system of government prevailing in *England*. If then the office of clerk of the peace was incident to the office of custos rotulorum in *England*, it seems to me to follow as a necessary natural consequence that the same rule must hold in *Ireland*, the nature of those several offices, and the duties required in relation to them, being the same in both countries. The various *Irish* acts of parliament referred to, 13 & 14 *G.* 3. *c.* 26., 23 & 24 *G.* 3. *c.* 39, 40., 35 *G.* 3. *c.* 29., 36 *G.* 3. *c.* 25., 40 *G.* 3. *c.* 80., directing documents to be deposited by the clerks of the peace among the records of their respective counties, and requiring them to give attested copies, appear to me strong legislative recognitions that the appointment of the office of clerk of the peace in *Ireland* is incidental to the office of custos. The act passed so recently as 1 *G.* 4. *c.* 27., which gives the clerk of the peace right to hold the office *quamdiu se bene gesserit*, shews that before that time the appointment of clerk of the peace was determined by the death

1829.

HARDING v. POLLOCK.

or removal of the custos who appointed, and therefore furnishes a strong inference that the appointment of clerk of the peace in *Ireland* was by law incident to the office of custos before the Union.

By the cases also which have been decided in *Ireland*, of *The King* v. *Fergusson* and *The King* v. *Severney and Falkiner*, this seems to have been received, declared, and acted upon, as the law of that country.

To the third question, whether the right to appoint to the office of clerk of the peace within the *King's County* in *Ireland*, did, by law, in and previously to the year 1800, belong to the crown or the custos rotulorum of the said shire, by virtue of his said office, or to any and what other person or persons; I also answer that the right to appoint to the office of clerk of the peace within the *King's County* in *Ireland*, did, by law, in and previously to the year 1800, belong to the custos rotulorum of the said shire, by virtue of his said office.

The frame of this question, has not failed to draw my attention to the consideration of any distinction which the historical fact, that the *King's County* was not formed into a county until the third and fourth year of the reign of *Philip* and *Mary*, in the year 1556, might naturally suggest.

I do not, however, apprehend that this circumstance can in any manner vary the question, having taken occasion to state in the most distinct and unqualified terms, that neither in *England* nor in *Ireland* can the right of the custos to nominate the clerk of the peace be maintained upon the ground of prescription, the office of custos rotulorum and of clerk of the peace in both countries, and the very county also in *Ireland* to which this question more directly applies, being each and every of them created and existing only within the time of legal memory.

But the moment in which the *King's County* became a county, however recent its formation, I conceive that the

the right to appoint a clerk of the peace, upon the principle and for the reasons I have before stated, as applicable to *England*, became *eo instanti* indispensably incident to the office of custos rotulorum in *Ireland*, there being no provisions in the statute of *Philip* and *Mary* to alter the law in this respect.

Being formed upon the model of other counties, with similar officers, such as custos rotulorum, sheriffs, &c., their appointment would be regulated and controlled by the same laws which prevailed in the government of those counties.

When in the reign of *Henry* VIII. the shire of *Monmouth* was created by a severance and division of the lordships and marches within the country or dominion of *Wales*, and by an union and annexation of certain portions of them thenceforth by legislative enactment, became part and member of the new shire of *Monmouth*, with a custos, sheriff, and other officers, I conceive that to the sheriff belonged the right of appointing the shire clerk of the county court, and to the custos rotulorum the right of appointing the clerk of the peace as incident to his office, in the same manner as in the most ancient counties in this realm.

Conceiving, therefore, the decision of this last question to depend upon the same principles in the explanation and development of which I fear that I have drawn but too largely upon your Lordships' patient attention in my discussing the merits of the first question, I conclude with expressing my humble opinion that the right to appoint to the office of clerk of the peace within the *King's County* in *Ireland*, did, by law, in and previously to the year 1800, belong to the custos rotulorum of the said shire, by virtue of his said office.

The other judges concurred in the opinions delivered by *Littledale* J., *Gaselee* J., and *Vaughan* B., and upon a subsequent day judgment was given as follows by the

1829.

HARDING v. POLLOCK.

LORD CHANCELLOR. My Lords, there is a case of *Harding* v. *Pollock*, which is a writ of error from the Court of Exchequer Chamber in *Ireland*. The question relates to the appointment of the clerk of the peace in the *King's County* in *Ireland*. It was contended on the one side, that the appointment of the clerk of the peace of the *King's County* in *Ireland* was in the crown; on the other hand it was contended, that it belonged to the custos rotulorum of the county. The Court of Exchequer Chamber in *Ireland* was of opinion that the appointment belonged to the crown.

A writ of error was brought, and it was argued in your Lordships' House during the last session of parliament. It was a case of great importance, and all the Judges were assembled for the purpose of hearing the arguments, in order that your Lordships might have the benefit of their advice and assistance with respect to the subject.

The learned Judges differed in opinion, and they postponed, therefore, delivering their judgments till the present session; that difference still continued; a great majority of the Judges, however, were of opinion, that the right to that appointment was in the custos rotulorum of the *King's County*, one single Judge dissenting. The opinions of the learned Judges were delivered at great length in your Lordships' House. I had an opportunity of attending to their reasonings at the time. I have since been favoured with copies of their judgments, and have had an opportunity of again considering them; and, without troubling your Lordships by going over the same arguments which have been already advanced upon the subject in great detail, it may be sufficient for me to state that I am satisfied that the decision of the Court below was erroneous, and that the appointment of this office is not in the crown, but in the custos rotulorum: and I am of that opinion upon the

1829.

HARDING v. POLLOCK.

the authorities that were cited by the learned Judges by which they fortified their opinion, and by the reasonings which they employed in support of their opinion. I should, therefore, propose to your Lordships that the judgment of the Court below be reversed.

Judgment reversed.

MILLS *v.* A. COLLETT, Clerk.

June 22.

TRESPASS for assault and imprisonment. Plea, not guilty.

At the trial before *Vaughan* B., *Suffolk* Spring assizes, it appeared that the Plaintiff had been brought before the Defendant, a magistrate for the county of *Suffolk*, on a charge of maliciously cutting down a tree; that the following depositions were taken by the magistrate's clerk: —

Defendant, as a magistrate, committed to prison as a felon, the Plaintiff, against whom a charge had been made of maliciously cutting down a tree on premises in his occupation, the property of *A. B.*: Held, that Defendant was not liable to an action.

Suffolk to wit. — "The deposition of *Robert Balls*, wheelwright, of the parish of *Cheddiston*, in the county of *Suffolk*, taken and made upon oath before us two of his majesty's justices of the peace for the said county, this eighteenth day of *October*, in the year of our lord one thousand eight hundred and twenty-seven, who saith that he knows the certain elm timber tree cut down by *Simon Mills* of *Cheddiston* aforesaid, farmer, and *Abraham Stannard*, of the parish of *Saint James South-elmham*, labourer, on the premises of the said *Simon Mills*, and that it is worth more than one pound sterling.

Before us "ROBERT BALLS."
"*L. R. Brown.*
"*A. Collett.*"

1829.

MILLS v. COLLETT.

Suffolk to wit. — "The deposition of *John Storkey*, husbandman, of the parish of *Linstead Parva*, in the county of *Suffolk*, taken and made upon oath before us two of his majesty's justices of the peace for the said county, this eighteenth day of *October*, in the year of our lord one thousand eight hundred and twenty-seven, who saith, that on *Monday* last, the fifteenth day of the present month of *October*, on the premises occupied by *Simon Mills* in the parish of *Cheddiston*, in the said county, the property of *John Badeley*, doctor of physic, namely, in the yard adjoining and belonging to the dwelling-house of the said premises, he saw *Simon Mills* of *Cheddiston*, aforesaid, and *Abraham Stannard*, labourer, of the parish of *Saint James Southelm*, wilfully and maliciously cutting, breaking, barking, rooting up, and otherwise destroying, a certain timber elm tree, the property of the said *John Badeley*.

Before us "JOHN STORKEY ⋈ his mark."

"*L. R. Brown.*

"*A. Collett.*"

And that the Defendant thereupon committed the Plaintiff for a felony to the county gaol, where he lay among felons for three months, till the ensuing *Epiphany* sessions, when, a compromise having been entered into between him and the prosecutor, he was discharged upon application to the court.

On the part of the Defendant it was contended, that for aught that appeared on the depositions, the Plaintiff might have been properly committed under 7 & 8 *G.* 4. *c.* 30. *s.* 19.; but that, at all events, as there was no proof of malice, the Defendant could only be charged with an error in judgment, for which he was not liable in an action.

The learned baron, being of this opinion, directed a nonsuit. An objection was taken to the notice of action, in

in which the residence of the Plaintiff's attorney was stated to be in *Half Moon Street, Picadilly, London.*

1829.

MILLS v. COLLETT.

Storks Serjt. obtained a rule *nisi* to set aside the nonsuit, on the ground that the tree being stated in the depositions to have stood on premises occupied by the Plaintiff, it must have been plain to the Defendant that the Plaintiff could not commit a trespass, much less a felony, by cutting it down. The Defendant, therefore, having acted without jurisdiction, and even without colorable cause, was liable in trespass.

Wilde and *Russell* Serjts., shewed cause.

There are two questions in this case, First, Whether there has been on the part of the Defendant, any error of judgment, any misconstruction of the act 7 & 8 *G.* 4. *c.* 30. By that statute it is enacted, *sect.* 19., "If any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the amount of the injury done shall exceed the sum of 1*l.*) shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any time not exceeding two years, and if a male, to be once, twice, or thrice privately or publicly whipped, (if the court shall so think fit) in addition to such imprisonment; and if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender

1829.

MILLS v. COLLETT.

(in case the amount of the injury done shall exceed the sum of 5*l.*) shall be guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the court may award for the felony hereinbefore last mentioned."

This provision was substituted for the black act, 9 *G.* 1. *c.* 22. *s.* 1., which made the offence capital where the malice was personal to the owner; and the 6 *G.* 3. *c.* 36. and 6 *G.* 3. *c.* 48., by the first of which, the offence, if done in the *night time*, was felony; and by the second, if done at any other time, was punishable by summary conviction for the first and second offences. It would be difficult to say why the present case is not clearly within the new statute. The word maliciously can scarcely be said to bear a signification, other than that which it had under the statute 6 *G.* 3. *c.* 36., upon which it was considered as bearing its most general signification, and as applying to an act done *malo animo*, from an unjust desire of gain, or a careless indifference of mischief. (*a*) Malice, in a legal sense, does not signify according to its common acceptation desire of revenge, or a settled anger against a particular person. And the statute does not limit the offence to the cutting down trees on the premises of persons other than the offender. It nowhere appears what interest the Plaintiff had in the premises on which he cut the tree; but even if there were an existing tenancy, felony may be committed in respect of demised property; as in arson, under the statutes, (though not at common law) and in larceny of chattels and fixtures let to tenants and lodgers by 7 & 8 *G.* 4. *c.* 29. *s.* 45. Suppose valuable or ornamental trees, — as an avenue, — to have been cut down maliciously by an occupier, might he not be punished under this statute? There was enough, there-

(*a*) 2 *East, P. C.* 1062.

fore,

fore, in the case for a magistrate to suppose that he had jurisdiction to commit for trial, and it was not for him to decide the law.

But, secondly, even if there were an error in judgment, the magistrate is not liable to an action. 3 *Hawk. P. C. c.* 8. *s.* 74. "Justices of the peace are not punishable *civilly* for acts done by them in their *judicial* capacities; but if they abuse the authority with which they are intrusted, they may be punished criminally at the suit of the king, by way of information. But in cases where they proceed *ministerially* rather than judicially, if they act *corruptly* they are liable to an action at the suit of the party, as well as to an information at the suit of the king." Again, in 3 *Hawk. P. C. c.* 13. *s.* 20. "Perhaps there may be this difference between the warrant of a justice of the peace, for such causes which he has not authority to hear and determine as judge without the concurrence of others, and such warrant for an offence which he may so determine without the concurrence of any other; that in the former case, inasmuch as he rather proceeds ministerially than judicially, if he act *corruptly* he is liable to an action at the suit of the party, as well as to an information at the suit of the king; but in the latter case he is punishable only at the suit of the king, for that regularly no man is liable to an action for what he doth as judge."

In *Windham* v. *Clere* (*a*), an action on the case was brought against the defendant as a justice, for maliciously issuing his warrant, in which it was alleged that plaintiff was accused of stealing a horse, *ubi revera*, plaintiff never was accused nor did steal the horse, and defendant knew him to be guiltless. The plaintiff had a verdict, and *Clench* and *Gawdy* say, "If a man be *accused* to a justice of the peace of an offence for which

(*a*) *Cro. Eliz.* 130. 1 *Leon.* 187. S. C.

he

1829.

MILLS v. COLLETT.

he causeth him to be arrested by his warrant, although the accusation be false, yet he is excusable; but if the party be *never accused*, but the justice of his malice and his own head cause him to be arrested it is otherwise."

And *Morgan* v. *Hughes*(*a*) is an authority, that where a justice maliciously grants a warrant against a person *without* an information, upon a supposed charge of felony, an action of trespass will lie. But no case can be found where such action has been attempted without imputation of corrupt motive or malice; and in *Lowther* v. *Lord Radnor*(*b*), it was held that trespass does not lie against justices acting upon a complaint made to them upon oath, by the terms of which they had no jurisdiction, though the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time.

Thirdly, with respect to the notice, *Steers* v. *Smith*(*c*) is a conclusive authority in support of the objection. In that case the notice described the plaintiff's attorney as of *New Inn*, *London*, instead of *New Inn*, *Westminster*, and Lord *Ellenborough* held that it was insufficient. *Piccadilly* can as little be said to be within what is properly called *London* as *New Inn*. [*Park* J. If I were to address a letter to the learned counsel, meaning it to find him, should I write "*Gower Street*, *Middlesex*?"] A very strict construction has always been given in favour of magistrates, to the statute requiring the notice of action. *Taylor* v. *Fenwick*(*d*) and *Aked* v. *Stocks*.(*e*)

Storks. It may be admitted that where a magistrate has jurisdiction he is not liable to an action unless corrupt motive or malice be proved.

(*a*) 2 *T. R.* 225.
(*b*) 8 *East*, 113.
(*c*) 6 *Esp.* 138.
(*d*) Cited by *Lawrence* J. in *Lovelace* v. *Curry*, 7 *T. R.* 631.
(*e*) 4 *Bingh.* 509.

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In the present case the Defendant had no jurisdiction, and he must have known that he had none, because it appears on the face of the depositions, which are not in the language of witnesses, but framed by the Defendant's clerk in the precise terms of the act, that the Plaintiff cut the tree on premises in his own occupation. He had not committed so much as a trespass, and for aught that appeared might have been in the exercise of a right, since most occupiers are entitled to cut wood for *house-bote*.

In *Crepps* v. *Durden* (*a*), a magistrate was holden liable in trespass for merely exceeding his jurisdiction: *à fortiori* he is liable, where he acts without jurisdiction. In *Davis* v. *Capper* (*Gloucester* Summer assizes, 1828) the plaintiff, a respectable female, sued the defendant, a magistrate, for committing her to prison for fourteen days, on a charge of theft of which she was innocent. The learned Judge who presided having directed a nonsuit, the Court of King's Bench awarded a new trial. (*b*)

With respect to the sufficiency of the notice, *Steers* v. *Smith* is only a *nisi prius* decision. It never could have been the intention of the legislature that courts of justice should descend to a paltry quibble, for the purpose of screening magistrates from the consequences of misconduct. The object of the statute was, that the magistrate should, with a view to tendering amends, if necessary, have effectual notice of the residence of the Plaintiff's attorney. For the purpose of useful information, *Piccadilly, London*, is a more instructive address than *Piccadilly, Middlesex*.

(*a*) *Cowp.* 640.

(*b*) See the circumstances of the case in *Davis* v. *Russell* (*5 Bingh.* 354.) Upon the new trial, a special jury awarded the plaintiff 10*l.* damages.

1829.

MILLS v. COLLETT.

TINDAL C. J. I am of opinion that the rule ought to be discharged. This is an action in which a magistrate is charged with trespass and false imprisonment for committing the Plaintiff to prison for trial, and the only question is, whether the magistrate had jurisdiction to investigate and commit. The information charges an offence within the statute 7 & 8 *G.* 4. *c.* 30. as a *felony*, and the question is, whether a charge being made of a distinct felony, the magistrate is answerable for the correctness of the charge if the case be disposed of as in other cases, where a magistrate is called upon to act. It would be most dangerous if he were holden to be liable in such a case. The act gives the magistrate no power to convict, but merely to sanction the commitment for trial. And in Sir *Edward Clere's* case (*a*) it was said, "If a man be accused to a justice of peace of an offence for which he causeth him to be arrested by his warrant, although the accusation be false, yet he is excusable." Undoubtedly it was not correct to take the depositions in the precise words of the act, because such could not have been the language of the witnesses; but that alone will not make the Defendant's conduct malicious. I cannot accede to the proposition, that the circumstance of a party's being the occupier of the premises on which the tree is cut, necessarily takes a case out of the statute. Suppose the trees excepted in a lease, the tenant would be a trespasser; and if liable in trespass, I am not prepared to say he might not be liable criminally. But that is not the ground of my decision. If a party charged with an offence be brought before a magistrate, he must exercise a judgment on the case, and he is not liable for a mere error of judgment. In *Crepps* v. *Durden*, the magistrate, having once convicted, had no jurisdiction; he was

(*a*) *Cro. El.* 130.

functus

functus officio. In the present case he had jurisdiction. I give no opinion on the other point. The rule must be discharged.

PARK J. I am of the same opinion. If when a charge is before him a magistrate does not exceed his jurisdiction, he is not liable to an action. In *Crepps* v. *Durden* he was *functus officio*. I reprobate the framing depositions in the words of acts of parliament, but that does not render the magistrate liable. The rule must be discharged.

BURROUGH J. If the magistrate has jurisdiction, as he had here, he never can be liable in an action of trespass, nor in any form of action for a mere mistake in a matter of law; and whether an occupier could commit a felony under the statute on his own premises, was clearly a matter of law. The depositions ought not to have been taken in the terms of the act of parliament. That is not the language of witnesses. But even if the magistrate were answerable for the misconduct of his clerk, trespass is not the form of action. I agree in the rule being discharged.

GASELEE J. I am sorry to agree in the opinion that the action cannot be maintained: but the law is so. The language of the statute under which the Plaintiff was committed, is general, and contains no exception of malicious injuries done by occupiers against their lessors. But independently of that, the defendant acted on his general authority; and if there were a probability of a felony having been committed, he was bound to proceed as in other cases. Suppose a committal on suspicion of murder, and it turns out not to be murder, shall the magistrate be liable? In *Crepps* v. *Durden* the magistrate

1829.

MILLS v. COLLETT.

magistrate had power not merely to enquire but to convict, and having convicted his jurisdiction ceased. Here the Defendant had jurisdiction, and the rule must be Discharged.

June 23.

GORING *v.* EDMONDS the Elder.

In *April* 1825, Defendant guaranteed the payment of money due from his son to the Plaintiff upon a sale of timber. The Plaintiff received part payment of the son, and made repeated unsuccessful applications to him for the residue till *December* 1827, when the son became bankrupt. The Plaintiff never disclosed to the Defendant the issue of these applications, but in *December* 1827 sued him on his guaranty: Held, that the Defendant was not discharged by the time that had elapsed, nor by want of notice of the applications made to his son.

ASSUMPSIT on the guaranty at the foot of the following agreement, which had been entered into by the Defendant's son.

"Agreement between *Charles Goring* Esquire and *Thomas Edmonds* jun. I, *Thomas Edmonds*, at *Steyning*, agree to purchase so many oak trees as are marked, and shall be marked by us at *Olbourne* and *East Grinstead*, at the price of 10*l.* per load, girth measure of fifty feet by the load. But should Mr. *Markwich*, when he measures the same, consider the sum of 10*l.* per load not a sufficient price, he is to fix such price as he considers it to be worth. And I hereby agree to pay the price he shall fix upon, though it shall exceed 10*l.* per load. And, further, I agree not to remove the timber or bark without the consent in writing of *Charles Goring* Esq. from off the said estates where the said timber shall be cut; and whatever securities I may give to *Charles Goring* Esq., to induce him to consent to the timber and bark being taken away, shall be taken up and discharged, half at *Michaelmas*, and the other half at *Christmas* next at farthest.

"THOMAS EDMONDS."

"In

1829.

GORING v. EDMONDS.

"In the event of my son *Thomas Edmonds* jun. not paying *Charles Goring* Esq., I hold myself liable, and hereby engage to fulfil the said payments according to the above conditions.

"THOMAS EDMONDS.

"*April* 20, 1825."

At the trial before *Tindal* C. J., *Middlesex* sittings after *Easter* term, it appeared, that the Defendant and his son having signed the foregoing instrument in *April* 1825, the timber was all removed by *Edmonds* the younger, without any further security being required. On the 19th *December* 1825, two bills for 200*l.* each, drawn by *Edmonds* the younger on one *Alexander*, and accepted by him, were paid into the plaintiff's bankers. These bills were duly honoured in *March* 1826. There remained then due to the Plaintiff in respect of the timber 486*l.* 16*s.* From that time to the close of 1827, repeated applications were made in vain to *Edmonds* the younger for payment. On the 1st of *October* 1827, *Edmonds* the younger gave the Plaintiff a bill for 200*l.* drawn by him on one *Williams*, which became due, and was dishonoured early in *December* 1827. The Plaintiff, however, never returned it, nor gave any notice of dishonour. About that time *Edmonds* the younger became bankrupt, and the Plaintiff, through his attorney, applied for the first time to the Defendant upon his guaranty, for payment of the 486*l.* 16*s.* The Defendant admitted his liability, but was not aware of the bill accepted by *Williams*.

On the part of the Defendant it was contended, at the trial, that his liability was discharged by the Plaintiff having taken bills from the son, and by his not having earlier communicated to the Defendant the state of the account. *Payne* v. *Ives* (*a*) was relied on.

(*a*) 3 *D.* & *R.* 664.

For

1829.

GORING v. EDMONDS.

For the Plaintiff it was insisted, that as there was a fixed day for payment, there had been no unreasonable delay in applying to the Defendant. The Chief Justice told the jury, that in order to discharge the Defendant, time must have been given, under such circumstances, that the Plaintiff must have lost his remedy against the original debtor; and he observed on the admission of liability made by the Defendant himself.

A verdict having been found for the Plaintiff, damages 486*l.* 16*s.*,

Russell Serjt. moved to set it aside, on the ground of a misdirection, or to reduce the damages by 200*l.*

The Defendant was discharged by the Plaintiff's dealings with the principal debtor. In *Peel* v *Tatlock* (*a*), it was considered by the Court, that delay in calling upon a guarantee does not exonerate him, unless it can be shewn or presumed that he is a loser thereby. But here the Defendant might well be presumed to be a loser. Two years, during which the principal creditor was in good credit, the guarantee was never called on. He was applied to only when the failure of his principal deprived him of any chance of being reimbursed.

In *Payne* v. *Ives and Others* (*b*), the defendants gave the following guaranty: — "We undertake to indorse any bill or bills Mr. *John Stubbs* may give to Messrs. *Payne* and Co. in part payment of an order for lace which is now being executed for him. Messrs. *Payne* and Co. to allow 5 per cent. on the amount of the said bills for the said guaranty." *Stubbs* paid the plaintiffs part of the amount in money, viz. 500*l.*, and gave them a bill for the remainder, viz. 387*l.* at eighteen months, and the plaintiffs kept the bill for seventeen months and

(*a*) 1 *B.* & *P.* 419. (*b*) 3 *D.* & *R.* 664.

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ten days; and then, finding that *Stubbs* was insolvent, applied for the first time to the defendants *Ives* and Co. for their indorsement. And it was held, that the plaintiffs were concluded by their laches, and that the defendants were not liable on their guaranty. *Abbott* C. J. said, "The general rule of law upon such subjects is clear, namely, that the demand must be made within a reasonable and convenient time. But for the plaintiffs to forbear their demand for seventeen months out of eighteen, was neither reasonable nor convenient. Besides, here the plaintiffs lie by till they learn that *Stubbs* is insolvent, and until they discover that the indorsement is the only means by which they can secure their debt; and, but for that discovery, they probably never would have applied at all. That, I think, they were not entitled to do under the agreement, and, consequently, they ought not to have recovered in this action." And *Bayley* J. said, "The option given to the Plaintiffs ought to have been made in a reasonable time, and, at any rate, before that event occurred, of which, if the defendants had known, they never would have given the guaranty." *Holroyd* J. said, "The Plaintiffs did not exercise their option till within a few days of the bill becoming due, and till they knew of the insolvency of the acceptor. I think they were not justified in such delay, and that is the only question in the cause. With respect to bonds, it is laid down by Lord Chief Baron *Comyns*, that where a condition is to do a transitory thing without limiting the time, it ought to be done immediately, that is, in a convenient time."

As to the 200*l.* bill, by keeping it and giving no notice, it is quite clear that the Plaintiff made it his own. The death, bankruptcy, or known insolvency (*a*) of the drawer, or his being in prison (*b*), constitute no

(*a*) *Russel* v. *Langstaffe*, *Dougl.* 514. *Esdaile* v. *Sowerby*, 11 *East*, 114.

(*b*) By Lord *Alvanley* C. J. *Haynes* v. *Birks*, 3 *Bos.* & *Pul.* 601.

1829.

GORING v. EDMONDS.

excuses either at law or in equity for the neglect to give due notice of non-acceptance or non-payment; and the reason is, that many means may remain of obtaining payment by the aid of friends or otherwise, of which it is reasonable that the drawer and indorsers should have the opportunity of availing themselves; and it is not competent to the holders to shew that the delay in giving notice has not in fact been prejudicial. (*a*)

Besides, the taking the bill was a discharge; at least *pro tanto;* as giving time for an hour discharges the surety. Defendant's acknowledgment could not affect his rights, when made in ignorance of the circumstances. In the case of a bill of exchange, a promise to pay, by an indorser or other party, if made without a knowledge of the laches of the holder in respect of such bill, will not be binding. *Blesard* v. *Hirst and another.* (*b*) *Goodall and Others* v. *Dolley.* (*c*)

In this last case a bill drawn in favour of defendant, payable 11th *January* 1787, was presented for acceptance by the plaintiffs on the 8th *November* 1786, when acceptance was refused; they gave no notice to the defendant till the 6th *January* 1787, and *then* they did not say when the bill was presented. The defendant proposed paying by instalments, which offer was rejected by the plaintiffs, and they brought the action. *Heath* J. ruled that the defendant was discharged for want of notice, and that his offer to pay being made in ignorance of the circumstances, was not binding: the jury found a verdict for the defendant, and upon cause shewn against a rule for a new trial, the Court held the direction and the verdict right.

TINDAL C. J. This is not a case for a new trial. There are two points on which it is suggested the jury have been misdirected. The first, that mere laches in

(*a*) *Esdaile* v. *Sowerby,* 11 *East,* 114.

(*b*) *Burr.* 2670.

(*c*) 1 *T. R.* 712.

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1829.

GORING v. EDMONDS.

the party secured will operate as a discharge to the surety: but no case goes to that extent, and there are many which establish the reverse. I am far from saying, there may not be an extreme case of laches amounting to fraud, and fraud would be a defence to the action; but not mere negligence. In *Trent Navigation Company* v. *Harley* (*a*), the obligees in a bond conditioned for the principal obligor to account for and pay over tolls, did not examine his accounts for eight or nine years, and did not call for payment so soon as they might have done; but they obtained a verdict in their favour; and on a motion for a new trial, Lord *Ellenborough* said, "The only question is, Whether the laches of the obligees in not calling on the principal so soon as they might have done, be an estoppel at law against the sureties? I know of no such estoppel at law, whatever remedy there may be in equity." The case of *Payne* v. *Ives* was on an executory promise to indorse in future any bills *Stubbs* might give in payment for lace, and no application was made to the defendants till nearly eighteen months after the bill was given. That might so alter the state of things as to be too late in an executory contract. But that will not govern the case of a guarantee. The second objection is, that the mere giving of time on the bill would discharge the Defendant: but in *English* v. *Darley* (*b*) it was held, that merely giving time, without an engagement to suspend the usual remedies, will not discharge the surety. The point here was left to the jury upon the material question, whether time had been given under such circumstances; and it appeared to me that they found correctly.

PARK J. I concur with my Lord Chief Justice. In the *London Assurance Company* v. *Buckle* (*c*), which was

(*a*) 10 *East*, 34. (*b*) 2 *B.* & *P.* 61. (*c*) 4 *B. Moore*, 153.

1829.

GORING v. EDMONDS.

an action of debt on a bond for 2000*l.* duly executed by an insurance broker as the principal obligor, and two sureties with a certain condition, it was held, that the sureties were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond. I fully concur in the doctrine there laid down, and that case is stronger than the present.

BURROUGH J. The direction to the jury cannot be impeached.

GASELEE J. I think a surety has a duty upon him to go and enquire as to the state of the transaction. In *Orme* v. *Young* (*a*) there was delay in giving notice, and yet the surety was holden not to be discharged.

Rule refused.

(*a*) 1 *Holt*, 84.

June 27.

HENLEY *v.* The Mayor and Corporation of LYME REGIS.

Where a verdict was taken by consent on two counts, the Court, on the application of the Plaintiff, amended the postea, by entering the verdict on one, (to which the evidence applied,) although the Judge who presided at the trial declined to interfere.

THE declaration in this cause contained five counts. Two charging the Defendants with the repair of sea walls, by virtue of a charter from the crown. Two by prescription; and one by virtue of possession.

At the trial before *Littledale* J., *Dorchester* Summer assizes 1828, after the evidence on the part of the Plaintiff had been heard, the learned Judge expressed

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1829.

HENLEY v. The Mayor of LYME REGIS.

an opinion that he must fail on the three last counts, and it was then agreed by the counsel on both sides to enter a verdict on the two first counts, which charged the Defendants under their charter. The jury were discharged as to the other counts.

The first of these two counts (see them *ante*, vol. v. p. 91.), set out the charter fully, alleged the possession of the Defendants under it, and the liability to repair as consequent on possession under the charter.

The second set out less of the charter, omitted any allegation of possession, and laid the liability as consequent on the charter.

The Defendants moved in arrest of judgment, and the decision of the Court having been in favour of the Plaintiff on the first two counts, an application was made to *Littledale* J. to permit the verdict to be entered on the first count only. The learned Judge declined to interfere, on the ground that the verdict had been entered on the first two counts by consent, but he transmitted to this Court his notes of the trial.

Wilde Serjt. moved for a rule to shew cause why the verdict should not be entered up on the first count alone.

He contended, that such entries were always made by the authority of the Court, although it was usual to apply to the Judge who presided at the trial for his concurrence, as he was the best acquainted with the evidence in the cause; but the rule was, that where the same cause of action was declared on in various counts, the verdict might be entered on any of them to which the evidence applied; and it was manifest here, that no evidence could have been given under the second count which did not equally apply to the first. The agreement at the trial was not restrictive of the right to enter the verdict on a single count, but restrictive only of the

1829.

HENLEY v. The Mayor of LYME REGIS.

number of counts on which the Plaintiff should have that privilege. The object of that agreement was to confine the argument on the contested question of law to some count which was borne out by the evidence; not to pin the Plaintiff to all the counts on which he might have offered evidence, for the purpose of entrapping him in some technical informality.

The following authorities were cited, to shew that the authority to apply the verdict to a particular count was in the Court, and not in the Judge who happened to preside at the trial. *Eliot* v. *Skypp* (*a*), *Hankey* v. *Smith* (*b*), *Newcomb* v. *Green* (*c*), *Spencer* v. *Gater* (*d*), *Petrie* v. *Hannay* (*e*), *Williams* v. *Breedon*. (*g*)

Taddy and *Merewether* Serjts. who shewed cause, did not deny the rule to be as stated, or the authority of the cases cited, but asserted that there was no case in which the entry had been made without the concurrence of the Judge who presided at the trial; and that in none of the cases cited had there been any agreement by the parties to take the verdict on particular counts. That agreement was conclusive between them, and the Court had no authority to interfere.

In *Richardson* v. *Mellish* (*h*), the Court would not act without the concurrence of the Judge who had tried the cause, and required a certificate from him, although he had quitted the Court.

Where the case arises on a contract, the cause of action may often be single; but where it arises on a tort, if there be any evidence which applies to an insufficient count, the *postea* cannot be amended. *Eddowes* v. *Hopkins*. (*i*)

(*a*) *Cro. Car.* 338.
(*b*) *Barnes*, 449.
(*c*) 2 *Str.* 1197. 1 *Wils.* 33.
(*d*) 1 *H. Bl.* 78.
(*e*) 3 *T. R.* 659.
(*g*) 1 *B. & P.* 329.
(*h*) 3 *Bingh.* 334.
(*i*) *Dougl.* 376.

Wilde.

1829.

HENLEY v. The Mayor of LYME REGIS.

Wilde. The cause of action on these two counts is clearly the same, namely, the Defendants' liability under the charter. The case, therefore, does not admit of comparison with ordinary actions on a tort. The Plaintiff is not only entitled to confine his verdict to a single count where the evidence admits of it, but he may be compelled to do so. *Lee* v. *Muggridge.* (*a*)

The Court being called into the Exchequer Chamber, the case stood over till this day, when

TINDAL C. J. said, The Plaintiff in this cause has made an application to enter the verdict on the first count of the declaration only, although, by consent, the verdict was taken on the two charter counts. Looking at the agreement between the parties, we think we shall carry it into effect by allowing the Plaintiff to enter his verdict on the first count. If, indeed, damages could have been given on the second count which could not have been given on the first, we should not do what is requested, without the concurrence of the Judge who tried the cause: but looking at the two counts, we perceive that the cause of action in both is the same; the charters set out are the same; and the damages given must have been on the same account. The two counts are only different modes of stating the same cause of action. We give effect, therefore, to the agreement, by allowing the Plaintiff to enter up his verdict on that count which he thinks states his cause of action the best. If we were to refuse the application, and a *venire de novo* were to be awarded upon a writ of error, we should only occasion unnecessary expense.

Rule absolute.

(*a*) 5 *Taunt.* 36.

1829.

June 29.

PHILPOTT *v.* DOBBINSON.

Avowry for rent due from Plaintiff, as tenant of premises to avowant, under a demise before then made, at the yearly rent of 170*l.*:

Held, not supported by proof of a conveyance to avowant, to which three trustees, the lessors, were parties, but which was executed by only two of them.

REPLEVIN for goods. The Defendant made cognisance, as bailiff of *Wm. Geo. Tate*, because the Plaintiff, for three quarters of a year next before the 24th of *June* 1828, and from thence until and at the time when, &c., enjoyed the dwelling-house, in which, &c., as tenant thereof to the said *Wm. Geo. Tate*, by virtue of a demise thereof to him, the Plaintiff, before then made, at the yearly rent of 170*l.*, payable quarterly, and 127*l.* 10*s.* was due for three quarters.

The Plaintiff pleaded *non tenuit modo et formâ*, and *riens en arriere.*

At the trial before *Tindal* C. J., *Middlesex* sittings after *Easter* term, it appeared that *Wm. Geo. Tate* claimed the rent as heir of *Wm. Tate*: and

That the Plaintiff had come into possession under a lease granted by *Joseph Bradney*. *Joseph Bradney* devised the property to three trustees in trust to sell. After *Bradney*'s death, the three trustees were parties to deeds of lease and release, bearing date the 30th and 31st of *December* 1824, by which the property was conveyed to *Wm. Tate*; but these deeds were executed by two only of the three trustees.

It was objected, that this evidence did not support the cognizance which was for the rent of the entire property, whereas, under the above conveyance, *Wm. Tate* took only two-thirds, of which he was tenant in common with the trustee who had omitted to execute the deed. A verdict having been taken for the Defendant, subject to the opinion of the Court on this point,

Wilde

1829.

PHILPOTT v. DOBBINSON.

Wilde Serjt. now moved for a rule *nisi* to set it aside on the foregoing objection. The Defendant ought to have made cognizance for two-thirds of the rent only, otherwise the contract on which the Plaintiff holds is not correctly described. *Brown* v. *Sayce.* (*a*) It is a clear rule of law, that tenants in common must sever in avowry, unless the rent reserved be an hawk, an horse, or the like, which cannot be severed, *Lit. s.* 314. 317. *Harrison* v. *Barnby* (*b*), *Pullen* v. *Palmer* (*c*), 2 *Vin. Abr.* 59. *Actions, Joinder, c.* 37.

A rule *nisi* having been granted,

Taddy and *Merewether* Serjts. shewed cause. No doubt a tenant in common must sever in avowry, and the Defendant *has* severed by not making cognizance as bailiff to the other tenant in common; but since the statute 11 *G.* 2. *c.* 19., it is unnecessary for a landlord to set out his title with precision, as he must have done at common law: to remedy that inconvenience the statute was passed, and it is sufficient if his avowry be general, and true to a general intent. Such is the cognizance here; for it is true, generally, that the Plaintiff held the premises at a rent of 170*l.* a year, and that he held as tenant to *Tate*, although *Tate* might be entitled to only two-thirds of the rent. It is not necessary that an avowry should have a greater degree of certainty than a declaration, and under an avowry for a whole year's rent a landlord may recover less, if less be due. In *Clotworthy* v. *Mitchell* (*d*), judgment was given for the avowant, who had pleaded that the whole of a rent had descended to him, although, in fact, only a part had descended. In *Grills* v. *Mannel* (*e*) it was holden that the amount of the avowant's estate was not material, pro-

(*a*) 4 *Taunt.* 320.
(*b*) 5 *T. R.* 246.
(*c*) 3 *Salk.* 207.
(*d*) *Winch.* 49.
(*e*) *Willes*, 378.

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1829.

PHILPOTT v. DOBBINSON.

vided there were a demise to justify the distress. *Pullen* v. *Palmer* was decided previously to 11 *G.* 2. In *Forty* v. *Imber* (*a*), the avowry alleged that the plaintiff had holden for two years, commencing with *Christmas*: it turned out that he had holden for a different time, ending at a different period. But Lord *Ellenborough* said, "It is unnecessary to revert to cases before the statute of 11 *G.* 2. *c.* 19. *s.* 22., which meant to relieve landlords from the difficulties which they before laboured under in making avowries for rent, and gives the avowry and cognizance in as general terms as possible; and there has been no case since that statute where, if it turned out that less rent was due than the defendant had avowed for, he has not been holden to be entitled to recover for so much rent as was due." So in *Hargrave* v. *Shewin* (*b*), an avowry was deemed sufficient which averred that the plaintiff held four closes, although it turned out in proof that he held six. The *modo et formâ*, therefore, is not a part of the matter in issue (*Hob.* 73.), particularly since the statute. In *Page* v. *Chuck* (*c*), where in replevin the defendant avowed for rent in arrear for a dwelling-house with the appurtenances, and it appeared in evidence the plaintiff merely occupied the upper part of the house, and that the shop and yard were in the occupations of other tenants, it was held to be no variance.

Wilde. The question on this avowry arises on the tenancy of the Plaintiff, and not on the right of the Defendant to rent: he cannot be said to have severed when he has made cognizance for a whole rent of 170*l.*, being entitled to no more than two-thirds; and though he may avow generally under the statute, he must avow truly, otherwise the judgment would be no bar to another

(*a*) 6 *East*, 434. (*b*) 6 *B.* & *C.* 34. (*c*) 10 *B. Moore*, 264.

action.

action. *Clotworthy* v. *Michel*, and *Hargrave* v. *Shewin*, turned altogether upon the issues raised, and not on the sufficiency of the avowry. In *Forty* v. *Imber*, the question was not as to the avowant's title, but merely as to the quantum due of rent undisputedly vested in him; and a landlord may always, under an avowry for a certain sum, prove a less sum to be due. In *Page* v. *Cluck*, the plaintiff had merely underlet part.

TINDAL C. J. We think that, in this case, a verdict must be entered for the Plaintiff. The issue which the Defendant has failed to establish, is in the first plea in bar, where the Plaintiff avers that he did not hold the premises in manner and form as the Defendant has alleged; and though the words *modo et formâ* do not embrace every part of the Defendant's allegation, yet they have always been held to embrace the contract between the parties. If authority were requisite, *Brown* v. *Sayce* is a distinct authority to that point; and the question is, whether there is not here a distinct allegation, that the Plaintiff's holding was at 170*l.* a year for the Defendant's interest in the premises. The statute 11 *G.* 2. was never meant to relieve the avowant from stating truly, though generally, the contract between the parties. If this case had occurred before the statute, the Defendant must have shewn the devise of the property by *Bradney* to the three trustees; the conveyance to him by two of them; and the distress for two-thirds of the rent. Since the statute a shorter mode of avowing is permitted; but the allegations essential to the contract must still correspond with the fact. The Defendant states that the Plaintiff holds the premises as tenant to *Tate* at 170*l.* a year: that allegation he has failed to prove. If a second distress were made for the whole rent by the other trustee, how could the judgment in the present case be pleaded in bar, when the record nowhere discloses

1829.

PHILPOTT v. DOBBINSON.

closes what the precise interest of the Defendant is, and what the extent of his contract with the Plaintiff?

There is a variance between the contract alleged and the contract proved, and the verdict must therefore be entered for the Plaintiff.

PARK J. I am of the same opinion. Since the statute 11 *G.* 2. the landlord may avow generally; but what he does allege he must allege truly. *Page* v. *Chuck* has no analogy with the present case.

BURROUGH J. Although the landlord may avow generally since the statute, he must prove his title to the rent as he alleges it.

Here he has alleged a title to the whole of the rent payable by the Plaintiff, whereas he could only support his claim to two-thirds. The cognizance, therefore, is not supported by the proof, and none of the cases cited for the defendant have any bearing on the subject.

GASELEE J. The only difficulty I felt was occasioned by the case from *Winch*; but that turns on the form of the issue, which was, whether a devise was properly pleaded.

Here there is an allegation that the Plaintiff held at a rent of 170*l.*, which means, payable to the party distraining; if not, an avowry is of no use. But the Plaintiff did not hold as tenant of the whole to the Defendant at a rent of 170*l.*, but as tenant of his two-thirds at a rent of 170*l.* for the whole.

Rule absolute.

1829.

WILLIAM DAY *v.* STUART.

July 1.

ASSUMPSIT by the holder against the Defendant, as the drawer and indorser of a bill of exchange for 311*l.* 17*s.* 6*d.*

A bill void under the stock-jobbing act is available in the hands of a *bonâ fide* holder without notice.

At the trial before *Tindal* C. J., *London* sittings in this term, the Plaintiff having called a witness to prove that the bill was indorsed to him for value, the defence set up was, that this bill had been given by the acceptor to the drawer for the amount of differences in time bargains in the public funds, contrary to the form of the stock-jobbing acts; and that the Plaintiff, through his uncle *James Day*, from whom he had taken the bill, was privy to this illegality. Of this, however, there was no clear evidence. An entry for the amount of the bill in the acceptor's book was read in evidence, and was as follows: — "To differences in consols 311*l.* 17*s.* 6*d.*"

And a witness was called, who said, *differences* might mean differences in point of time.

The Chief Justice told the jury that *differences* might have a legal meaning, and that they were to determine whether the parties meant differences in point of time, or differences between stock bought and stock sold.

The jury having found for the Plaintiff, *Taddy* Serjt. moved to set aside the verdict, on the ground that the entry in the acceptor's book was sufficient to shew that the bill was given for time differences; and if so, was absolutely void. [*Tindal* C. J. Supposing the fact to have been so, it was not shewn that the holder had any notice of it; and *Edwards* v. *Dick* (*a*) has decided that a bill, void to all intents and purposes, may be available in the hands of an indorsee without notice.]

(*a*) 4 *B.* & *A.* 212.

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1829.

DAY v. STUART.

That was a case on the gaming laws. But in *Steers* v. *Lashley* (*a*), stock-jobbing was decided to be a good defence even against a *bonâ fide* holder.

TINDAL C. J. I am not aware that, if the cause were heard again, a different direction could be given to the jury; and if the case of *Edwards* v. *Dick* had occurred to me at the trial, I must have charged them more unfavourably for the Defendant than I did. The Defendant had the benefit of the witness who stated that differences might mean differences in time; his credit went to the jury; but I am not prepared to go so far as to say that *differences* must necessarily mean *illegal* differences. I think a new trial ought not to be granted.

The rest of the Court concurring, the rule was

Refused.

(*a*) 6 *T. R.* 61.

July 2.

ADAMS and Others *v.* BATESON.

It is a fatal variance to describe a bond, conditioned for payment by *A.*, *B.*, and *C.*, as a bond conditioned for payment by *A.*, *B.*, and *D.*, although the bond be several as well as joint, and the action be brought against *A.* severally, and he, with full knowledge of the alteration, have paid a part by instalment.

THE Plaintiff declared against *Bateson* alone, on a bond in the penal sum of 2000*l.*, subject to a condition, that if *Bateson*, *Reay*, and *Robinson*, any or either of them, should pay Plaintiff 1000*l.* in manner and at the times therein mentioned, the bond should be void. Breach, that on a certain day 700*l.*, parcel of the 1000*l.*, with interest, was due and payable from the Defendant and *Reay* and *Robinson*, and had not been paid. *Per quod actio accrevit.*

Plea, *non est factum*. At the trial, *London* sittings after *Michaelmas* term 1828, by a special verdict it was found that the bond was a joint and several bond, executed

ecuted by *Bateson*, *Reay*, and one *Hall*. That the said bond, and the said condition, after the making, sealing, and delivery thereof by the said Defendant, were, by the direction of one *Machell*, (the borrower of the said sum of 1000*l*. in the said condition mentioned, and for the payment whereof the said bond was made and executed,) altered and varied in this, that the words following, to wit, *John Hall* of *Lancaster*, spirit merchant, were erased out of the said bond, and the words following, to wit, *Thomas Robinson* of *Liverpool*, ship-broker and merchant, were substituted in lieu thereof; and also that the words following, to wit, *John Hall*, were erased out of the condition of the said bond and the words following, to wit, *Thomas Robinson*, were substituted in lieu thereof; to which said alterations the said Plaintiffs assented, previously to the said alterations or any of them being made: and that the said bond, subject to the said condition so altered as aforesaid, was thereupon signed, sealed, and delivered, by the said *Thomas Robinson*, who was another and a different person from the said *John Hall*.

That the aforesaid substitution of the name of the said *Thomas Robinson* for that of the said *John Hall*, in the said bond and the condition thereof, was made without the assent, knowledge, permission, or authority of the said Defendant, and that he the said Defendant had never re-executed the said bond.

That the said Defendant, since the making of the said alteration in the said bond and condition, and with full knowledge thereof, had assented thereto, by acknowledging his liability to pay the said sum of 1000*l*., with the said interest, in the said condition mentioned, and by the payment of certain of the instalments. And if upon the whole matter the Court should esteem it the bond of the Defendant, they found for the Plaintiff; if the Court should deem it otherwise, they found for the Defendant.

The

1829.

ADAMS v. BATESON.

The case was argued in *Easter* term, by *Taddy* Serjt. for the Plaintiffs, and *Stephen* Serjt. for the Defendant.

On the part of the Plaintiffs it was contended, that as the Defendant was severally liable, and declared against as such, the bond, as to this action, must be considered as his bond alone. If it were his bond alone, he could take no notice of any proceeding affecting another several obligor. As far as regarded the Defendant, therefore, the bond was not avoided by any alteration which merely substituted one several obligor for another. The Defendant's liability remained unchanged, and that was the principal test as to the materiality of alterations in deeds: if the Defendant's liability were unchanged, the alteration, especially as having been made by a stranger, was immaterial, and the variance between the bond set out and that given in evidence was equally immaterial. That was the effect of all the authorities which had recently been reviewed and collected in *Hudson* v. *Revett.* (*a*) But, at all events, the Defendant had recognized the alteration, and adopted the bond in its altered state by subsequent assent. The payment by instalments was proof that he had taken the benefit of the instrument, and if so, must incur the *onus*.

For the Defendant, it was argued, that no assent except by deed could restore the validity of a deed avoided by alteration; that the materiality did not depend on the consequences, but on the kind of alteration; that this was an alteration of the condition, which was in fact an alteration of the contract; and the Defendant might have seen reasons for consenting to be bound jointly and severally with *Reay* and *Robinson*, and for refusing to be so bound with *Reay* and *Hall*.

(*a*) 5 *Bingh.* 368. Having been so recently referred to, they are not repeated here; and the argument is much abridged, as the judgment of the Court turned exclusively on the variance.

The

1829.

ADAMS v. BATESON.

The materiality, therefore, of the variance upon *non est factum* was manifest: the Defendant had executed a bond conditioned for payment by himself, *Reay*, and *Robinson*, and had not executed a bond conditioned for payment by himself, *Reay*, and *Hall*. But whether the alteration were material or not, it avoided the bond, because it was made with the privity of the obligee, and without the privity of the obligor. *Pigot*'s case (*a*); *Bayless* v. *Dinely*. (*b*)

In reply it was argued, that there was no necessity for setting out the condition of the bond in the declaration, and that as the Defendant's obligation was several, the effect of the condition, as far as regarded this action, was, several payment by him.

Cur. adv. vult.

The judgment of the Court was this day delivered by PARK J., who, after reading the pleadings and special verdict, proceeded,

Two points have been made on the part of the Defendant: first, that the bond is avoided by the alteration which has been made; and, secondly, that there is a material variance between the condition set out and that which appears on the bond given in evidence. Our opinion on the second point renders it unnecessary to decide the first. The bond produced, so far from being a bond conditioned for payment by the three persons named in the declaration, is a bond for payment by three persons, one of whom is not named in the declaration. We confine our decision to this point. There must be

Judgment for the Defendant.

Best C. J. was not present at the argument.

(*a*) 11 *Rep.* 27. (*b*) 3 *M.* & *S.* 477.

1829.

July 3. SIMONDS and LODER *v.* HODGSON.

The master of a brig bound himself and the brig for the repayment of money borrowed to repair her in a foreign port, with 12 per cent. bottomry premium, eight days after his arrival in *London*.

The lender effected an insurance on the risk, and in the policy described his interest to be on bottomry:

Held, that this was not bottomry, and that the misdescription was fatal.

THE first count of the declaration was as follows: — Whereas heretofore, to wit, on the 29th *March*, in the year of our Lord 1828, in parts beyond the seas, to wit, at *Copenhagen*, in the kingdom of *Denmark*, to wit, at *London*, one *William Adams*, then and there being commander of a certain schooner brig called the *Clarence*, of *Bristol* in *Great Britain*, according to the custom of merchants, made his certain writing obligatory, or bottomry bond, sealed with the seal of the said *William Adams*; which said writing obligatory the said Plaintiffs now bring here into Court, the date whereof is the same day and year aforesaid, and the tenor as follows: —

"I, the underwritten *William Adams*, commander of the schooner brig *Clarence*, of *Bristol* in *Great Britain*, lying in the harbour of *Copenhagen*, having on my passage from *St. Petersburgh* to *London* had the misfortune to run the said schooner brig on shore upon *Fosterborne Reef*, Coast *Sweden*, where she received considerable damage, and being unable to proceed in that state on her voyage, was compelled to put into this port to discharge and repair the damage; to pay the charges and expences attending the said repairs, unloading and reloading, and putting the said ship in a state to proceed on her voyage, being loaded with a cargo of tallow, &c. I have borrowed and received from Messrs. *Belfour*, *Ellah*, and *Rainalls*, and Co., of *Elsineur*, the sum of 1077*l.* 17*s.* 9*d.* sterling, to pay for the above-mentioned repairs, together with labourage, commissions, and other adherent expences proceeding from the said mis-

misfortune, without which having been paid and done the said schooner brig could not proceed on her destined voyage to *London*; and having received in hand the above-mentioned sum of 1077*l.* 17*s.* 9*d.* sterling, I bind myself, my heirs, administrators, and assigns, particularly the above-mentioned schooner brig *Clarence*, together with all the apparel, tackle, boats, and stores of every kind belonging to the said schooner brig, as well as her present freight and cargo, consisting of tallow, lathwood, &c. thankfully to consent and pay to the said Messrs. *Belfour*, *Ellah*, *Rainalls*, and Co. aforesaid, or their attornies or assigns, the above mentioned sum of 1077*l.* 17*s.* 9*d.* sterling, with 12 per cent. bottomry premium, all postages and reasonable charges attending recovering the same: and putting aside all and every detention of law, arbitration, or reference, I do further hereby bind myself, said schooner brig *Clarence*, her freight and cargo of every kind, to the full and complete payment of said sum, with all charges thereon, in eight days after my arrival at the aforementioned port of *London*: and I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the above-mentioned port of *London*, in preference to all other debts and claims; declaring hereby that the said vessel is at present free from all incumbrances whatsoever, and that this pledge or bottomry has now and must have preference to all other claims and charges in any shape or manner, until such sum of 1077*l.* 17*s.* 9*d.* sterling, with 12 per cent. bottomry premium, making together 1207*l.* 4*s.* 8*d.* sterling, with lawful interest, and all charges are duly paid in money of *Great Britain*, or until the said Messrs. *Belfour*, *Ellah*, *Rainalls*, and Co. of *Elsineur*, or their assigns, have declared themselves in writing fully satisfied with security given for such payment," as by the said writing obligatory, reference being thereunto had, fully appears:

1829.

SIMONDS v. HODGSON.

And whereas the said Messrs. *Belfour*, *Ellah*, *Rainalls*, and Co., in the said writing obligatory mentioned, did at the time of the making of the said writing obligatory, to wit, on, &c. at, &c. as the agents of and on account and behalf and at request of the said Plaintiffs, lend and advance to the said *William Adams* the said sum of 1077*l.* 17*s.* 9*d.* of the monies of them the said Plaintiffs, on bottomry, in manner and for the purposes and on the conditions in the said writing obligatory specified: and whereas the said writing obligatory was made and executed to the said Messrs. *Belfour*, *Ellah*, *Rainalls*, and Co. as such agents of the said Plaintiffs, and on their behalf and for their use and benefit, whereof the said *William Adams* then and there had notice:

And whereas, after the making of the said writing obligatory, and after the lending and advancing of the said sum of 1077*l.* 17*s.* 9*d.*, to wit, on, &c. at, &c. the said *William May Simonds* on behalf of himself and the said *Giles Loder*, according to the usage and custom of merchants, caused to be made a certain writing or policy of assurance, containing therein that the said *William May Simonds*, by the name and addition of *W. M. Simonds*, Esq., as well in his own name as for and in the name and names of all and every person or persons to whom the same did, might, or should appertain in part or in all, did make assurance and cause himself and them and every of them to be insured, lost or not lost at and from *Elsineur* to *London*, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the *Clarence*, &c. (in the usual form,) continuing the adventure until the said ship, &c. with all her ordnance, tackle, apparel, &c. and goods and merchandizes whatsoever should be arrived at *London*, and until she had moored at anchor twenty-four hours in good safety, &c.; and that *the said ship, &c.* goods and merchandizes, &c. *for so much as concerned*

cerned the assured, by agreement between the assured and assurers in that policy, were and should be valued at l. on bottomry, free from average, and without benefit of salvage; as by the said writing or policy of assurance, reference being thereunto had, will more fully appear; of all which said premises the said Defendant afterwards, to wit, on, &c. at, &c. had notice:

And thereupon afterwards, to wit, on, &c. at, &c. in consideration that the Plaintiffs, at the special instance and request of the Defendant, had then and there paid to him a large sum of money, to wit, the sum of 1*l.* 11*s.* 6*d.*, as a premium and reward for the assurance of 200*l.* of and upon the premises in the said writing or policy of assurance mentioned, and had then and there undertaken, and to the Defendant faithfully promised to perform and fulfil all things in the said writing or policy of assurance contained, on the part and behalf of the assured, to be done, performed, and fulfilled, the Defendant undertook, and to the Plaintiffs then and there faithfully promised that the Defendant would become and be an assurer to the Plaintiffs for the sum of 200*l.*, of and upon the premises in the said writing or policy of assurance mentioned, and would perform all things in the said writing or policy of insurance contained on his part and behalf, as such assurer of the said sum of 200*l.*, to be performed and fulfilled; and the Defendant then and there became an assurer to the Plaintiffs, and then and there duly subscribed the said writing or policy of assurance as such assurer as aforesaid, to wit, at, &c.

And the Plaintiffs further say, that the ship or vessel in the said policy mentioned is the same ship or vessel in the said writing obligatory mentioned, and that the sum of 200*l.* insured by the said policy was by way of insurance of part of the said sum of 1207*l.* 4*s.* 8*d.* in the said writing obligatory mentioned; and that the said bottomry in the said policy mentioned is the same bottomry in said writing obligatory mentioned; and that

1829.

SIMONDS v. HODGSON.

heretofore, to wit, on, &c. the said ship or vessel with her said cargo in the said writing obligatory mentioned, in the prosecution of her said voyage from *St. Petersburgh* to *London*, in the writing obligatory mentioned, departed and set sail from *Copenhagen* aforesaid, and in the course of that voyage arrived at *Elsineur* in the said policy mentioned; and on, &c. the said ship and cargo were in good safety, to wit, at *Elsineur* therein mentioned; and that the Plaintiffs at the time of making the said insurance, and continually afterwards, until and at the time of the loss hereinafter mentioned, were interested in the said bottomry in the said insurance to a large value and amount, to wit, to the value and amount of all the monies by them ever insured or caused to be insured thereon; and that the said policy was made *on the said bottomry* to and for the use and benefit and on the account of the said Plaintiffs, to wit, at, &c.

And the Plaintiffs further say, that afterwards, to wit, on, &c. the said ship with the said cargo on board thereof, in prosecution of her said voyage from *St. Petersburgh*, departed and set sail from *Elsineur* aforesaid on her said intended voyage in the said policy mentioned; and afterwards, and whilst she was proceeding on the said voyage, and before she arrived at *London* aforesaid, to wit, on, &c. was by and through the force of stormy and tempestuous weather, and by the perils and dangers of the seas, wrecked, stranded, driven on shore, and wholly lost, and never did proceed on the same or any other voyage, and never did arrive at *London* aforesaid; and the said cargo thereby became and was spoiled, damaged, destroyed, and wholly lost; and the said freight, also in the said writing obligatory mentioned, became and was by reason of the premises wholly lost, to wit, at, &c. whereof the said Defendant afterwards, to wit, on, &c. there had notice. By reason whereof the said Defendant then and there became

became and was liable to pay, and ought to have paid the said sum of 200*l.* so by him insured as aforesaid, according to the meaning and effect of the said writing or policy of insurance, and of his said promise and undertaking so by him made as aforesaid, to wit, at, &c.

Demurrer and joinder.

Wilde Serjt. in support of the demurrer. The bond set out is not a bottomry bond; the declaration, therefore, is ill in two respects: first, because it misdescribes the bond; and, secondly, because it discloses no insurable interest, unless the bond be a bottomry bond. A bottomry contract exists only where money lent is hazarded on the bottom of a ship, and is payable only on her arrival at the end of her voyage.

In the present contract, the master having bound himself personally, the payment of the sum borrowed never depended on the arrival of the ship. The lender might have demanded it, according to the bond, although the ship never left *Elsineur*. The contract is without benefit of salvage and free from average, and the Plaintiff's money never was in risk.

Stephen Serjt. *contrà*. There must, no doubt, be some risk where money is lent on bottomry; according to the definition given by *Blackstone*, "Bottomry is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship (*pars pro toto*) as a security for repayment: in which case it is understood that if the ship be lost, the lender loses his whole money; but if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest;" but the risk may be more or less; and this case falls within the statutory definition in the preamble of

1829.

SIMONDS v. HODGSON.

6 *G.* 1. *c.* 18. Bottomry bonds vary in form; and in Appendix, No. 2. of *Abbott on Shipping*, is a form which comes near the present. Policies on bottomry, containing the condition "without benefit of salvage, and free from average," are effected in *Denmark* and *Spain*; *Busk* v. *Fearon* (*a*), *Walpole* v. *Ewer* (*b*); and by 19 *G.* 2. *c.* 37. in *respondentia* on *East India* voyages. But the effect of the instrument here is, that the money shall only be paid on the arrival of the ship. "After *my* arrival," means after my arrival as master of the ship. Even the master's personal arrival is a matter of contingency, and places the money at hazard. That contingency is sufficient to render this a contract of bottomry; and if there were any doubt, the employment of the word bottomry in the bond ought to be conclusive.

Wilde. The form in the Appendix to *Abbott on Shipping* is the form of an *East India* bond; and the statutory regulations of *East India* voyages do not apply to ordinary bottomry. Risk on the ship's bottom is of the essence of the contract. Here, if the master arrived, the money might be recovered although the ship were lost.

TINDAL C. J. Our judgment must be for the Defendant. When the underwriter entered into a contract in which the interest of the assured was described to be an interest on bottomry, he expected, no doubt, that it would be what is ordinarily termed bottomry interest; but such a description of the bond and of the Plaintiff's interest is manifestly false, since the Plaintiff's claim under it does not depend on the risk of the voyage, but, according to the terms employed, may be made whether the ship do or do not arrive.

(*a*) 4 *East*, 325. (*b*) *Park on Ins.* 423. 4th edit.

PARK

1829.

SIMONDS v. HODGSON.

PARK J. In *Glover* v. *Black* (*a*) it was decided, that when the interest of the assured is in *bottomry* or *respondentia*, it must be mentioned in the policy; but the interest here is of a nature totally different from bottomry or *respondentia*. Lord *Kenyon* was new in his office when *Walpole* v. *Ewer* was decided, and the decision did not give satisfaction. Mr. Justice *Buller* in *Newman* v. *Cazalet* (*b*) differed, but put the decision on the ground of usage in the particular case; and Lord *Ellenborough* in *Power* v. *Whitmore* (*c*) decided contrary to *Walpole* v. *Ewer*.

BURROUGH J. and GASELEE J. concurred in giving Judgment for the Defendant.

(*a*) 3 *Burr.* 1394. (*b*) *Park on Ins.* 424. (*c*) 4 *M.* & *S.* 141.

CURLING *v.* SHUTTLEWORTH.

July 3.

By a deed of 1812, mortgagor assigned to mortgagee a policy of insurance; in a deed of 1813, between the same parties, upon a further advance, there was a power to sell the policy if the mortgage money were not paid on a given day; but upon a further advance in 1822, with conversion of unpaid interest into principal by a third deed, the power was omitted:

The mortgagee having afterwards advertised the policy for sale *under a power*, and the mortgagor having refused to concur in the conveyance,

Held, that a purchaser was entitled to recover back the deposit money paid on the sale.

THIS was an action on the case, brought by the Plaintiff to recover from the Defendant the sum of 322*l.*, and interest thereon, at 5 *per cent.*, from the 5th *October* 1828.

The declaration contained the usual money counts, a count for interest, and on an account stated. The cause was tried at the first *London* sittings in *Easter* term last, when a verdict was, by consent, taken for the

Plaintiff,

1829.

CURLING v. SHUTTLEWORTH.

Plaintiff, damages 500*l.*, subject to the opinion of the Court on the following case: —

The Defendant, who was an auctioneer, offered for sale by auction two policies of assurance, in the Society for Equitable Assurances, according to certain particulars and conditions of sale. The particulars stated that such policies would be sold by order of the executors of the mortgagee, *John Chatfield*, Esq., deceased, and *under a power of sale.*

The Plaintiff attended the sale, and was declared the purchaser of the second lot mentioned in the particulars of sale, for the sum of 1610*l.* The lot was described as a Policy of Assurance, No. 24143, for the sum of 2000*l.*, effected with the Equitable Society, *Blackfriars*, *June* 18th, 1808, by a gentleman now in the 61st year of his age or thereabouts, with the accumulations thereon, amounting to 1100*l.* or thereabouts, making in the whole 3100*l.* or thereabouts, annual premium 69*l.* 16*s.* The fourth condition of sale provided that the purchasers should, at their own expense, have proper assignments from the vendors, on payment of the residue of the purchase-money. The Plaintiff paid the sum of 322*l.* as a deposit.

The Plaintiff also signed the following agreement, endorsed on a particular of sale.

"I hereby agree to purchase Lot 2. described in this particular agreeably to the annexed conditions, and to give for the same the sum of one thousand six hundred and ten pounds."

On the 21st of *October* 1828, an abstract of the title of the vendors to the policy was delivered by their solicitors to the solicitors of the Plaintiff, which set out the following documents; (viz.)

A policy of insurance in the usual form, dated the 18th *June* 1808, numbered 24,143, and under the hands

and

and seals of two of the trustees of the Society for Equitable Assurances on lives and survivorships, on the life of *Charles Bankhead*, of *Lower Grosvenor Street*, in the county of *Middlesex*, Doctor of Medicine: —

An indenture, of the 1st of *February* 1812, and made between the said *Charles Bankhead* of the one part, and *John Chatfield*, Esq, of the other part; whereby, in consideration of 845*l.*, therein mentioned to be due and owing from the said *Charles Bankhead* to the said *John Chatfield*, he, the said *Charles Bankhead*, assigned unto the said *John Chatfield*, his executors, administrators, and assigns, together with another policy, the said policy of assurance, and all money then due or to become due by virtue thereof, subject to a proviso for redemption, on payment of the sum of 845*l.* and interest at 5 *per cent.*, on the 1st day of *March* then next: —

A deed poll, indorsed on the said last-mentioned indenture dated the 3d of *April* 1813, and under the hand and seal of the said *Charles Bankhead*; reciting a loan from the said *John Chatfield* to the said *Charles Bankhead* of 560*l.*, in addition to the said sum of 845*l.*, the whole of which sum of 845*l.* and interest, as well as the said sum of 560*l.*, still remained due to the said *John Chatfield*, and that the said *Charles Bankhead* had agreed to make such further assurance for securing the same as thereinafter mentioned, in consideration of the said sum of 560*l.*; and for securing the repayment thereof, and such further sums as thereinafter mentioned, with interest, the said *Charles Bankhead* covenanted with the said *John Chatfield*, that the said policy of assurance, and all other the premises by the last-mentioned indenture assigned, should stand charged with and be a security unto the said *John Chatfield*, his executors, administrators, and assigns, as well for the payment of the said sum of 845*l.* and interest, and the said sum of 560*l.*

and

1829.

CURLING v. SHUTTLEWORTH.

and interest, as also for all such further and other sum and sums of money as might be advanced and lent or paid unto or for the said *Charles Bankhead*, by the said *John Chatfield*, his executors, administrators, or assigns; or which might be paid by the said *John Chatfield*, his executors, administrators, or assigns, to the said assurance office, or otherwise, to keep on foot the said policy and the full benefit thereof, together with interest, and all such costs, charges, and expenses as therein mentioned, not exceeding in the whole, exclusive of the said sum of 845*l.*, the sum of 3000*l.*; and that the said policies and premises should not be redeemed or redeemable, either in law or in equity, until not only the said sum of 845*l.* and interest, and 560*l.* and interest, but also all such further sum and sums of money which might at any time be lent, advanced, or paid by the said *John Chatfield* to or for the said *Charles Bankhead*, should be fully paid and satisfied: and for the considerations in the said deed poll before mentioned, and for better securing to the said *John Chatfield*, his executors, administrators, and assigns, the due payment of the said several sums of 845*l.* and 560*l.*, and such further sums of money as might be paid, advanced, or lent by the said *John Chatfield*, his executors, administrators, or assigns, by virtue of the said deed poll, with interest for the same as therein aforesaid, the said *Charles Bankhead* did thereby expressly and fully authorize and empower the said *John Chatfield*, his executors, administrators, or assigns, in case the said several sums of 845*l.* and 560*l.*, and such (if any) further sum or sums of money as might be advanced or paid as therein aforesaid, with interest as therein aforesaid, should not be fully paid off and satisfied to the said *John Chatfield*, his executors, administrators, or assigns, on or before the 1st day of *June* then next, at any time or times after the said 1st day

1829.

CURLING v. SHUTTLEWORTH.

day of *June* then next, to sell and absolutely dispose of the said policy of assurance, and all benefit and advantage thereof, either by public auction or private contract, unto any person or persons whomsoever, for any reasonable price which could at the time of such sale be obtained for the same; and to seal, execute, and deliver all such deeds, conveyances, and assurances as might be requisite and proper for the completion of such sale or sales, and vesting the same premises in the purchaser or purchasers thereof, and to stand possessed of and interested in all and every the sum and sums of money which should arise and be produced from such sale or sales, upon trust, after paying thereout the costs of the sale, to retain the said sums of 845*l.* and 560*l.*, and such sum or sums of money as might thereafter be paid, advanced, or lent by the said *John Chatfield*, his executors, administrators, or assigns, in pursuance of the said deed poll, or the indenture of the 1st *February* 1812, and interest, and to pay the residue unto the said *Charles Bankhead*, his executors, administrators, or assigns: and it was by the said deed poll declared, that all contracts, agreements, sales, conveyances, and assurances, acts, deeds, matters, and things which should be entered into, made, done, or executed by the said *John Chatfield*, his executors, administrators, or assigns, of or concerning the said policy and premises, should to all intents and purposes be valid and effectual, although the said *Charles Bankhead*, his executors or administrators, should not execute, join, concur in, or assent to the same; and that the purchaser or purchasers should be entitled to have, hold, and enjoy the same against the said *Charles Bankhead*, his executors, administrators, and assigns, and all persons claiming or to claim under or in trust for him or them, in like manner as if the said *Charles Bankhead*, his executors, administrators, or assigns,

1829.

CURLING v. SHUTTLEWORTH.

assigns, had been a party to and executed the conveyance or assurance thereof, free from all equity and benefit of redemption, claim, and demand whatsoever; and that the receipts of the said *John Chatfield*, his executors, administrators, or assigns, should be sufficient discharges to the purchasers of the said premises; and that such purchasers should not afterwards be answerable for any loss, misapplication, or non-application of their purchase-money: —

An indenture dated 3d *June* 1822, and made between the said *Charles Bankhead* of the one part, and the said *John Chatfield* of the other part, by which, after reciting, amongst other things, the indenture of the 1st of *February* 1812, and the deed poll of the 3d of *April* 1813; and reciting certain indentures of settlement by virtue whereof the said *Charles Bankhead* was entitled to a contingent estate for life, and a contingent reversionary interest in certain leasehold property, held under renewable leases granted by the Lord Primate of *Ireland*; and also reciting that the said sum of 845*l.*, secured by the said indenture of the 1st of *February* 1812, and then still due to the said *John Chatfield*, together with all interest for the same to the 1st of *January* then last; and that the said sum of 560*l.*, secured by the said deed poll of the 3d *April* 1813, was still due to the said *John Chatfield*, together with lawful interest thereon up to the 1st of *January* then last; and also reciting that the said *John Chatfield*, on the 1st of *January* 1814, lent to the said *Charles Bankhead*, on the security of the said deed poll, a further sum of money, making, with the interest due at that time on the said two several sums of 845*l.* and 560*l.*, the sum of 1295*l.*, and for which said sum of 1295*l.* the said *Charles Bankhead* gave his note of hand to the said *John Chatfield*, payable on demand, with legal interest for the same; and also reciting that all interest in respect of the said sum of 1295*l.*

1295*l.* was due to the said *John Chatfield* up to the said 1st of *January* then last; and that the said sums, secured by the said recited indenture and deed poll, and the interest for the same respectively up to the 1st of *January* then last, made together the sum of 3780*l.*, which it had been agreed should be all considered as principal, and should carry interest on the whole amount thereof from the 1st of *January* then last; and also reciting that the said *John Chatfield* had then lately paid or advanced to or on account of the said *Charles Bankhead*, or had become security for him for several sums of money, making in the whole 928*l.* 12*s.* 10*d.*; and that in order further to secure the repayment to the said *John Chatfield* of the said sum of 3780*l.* and 928*l.* 12*s.* 10*d.*, making together 4708*l.* 12*s.* 10*d.*, and interest for the same, and of such further or other sums of money as thereinafter mentioned, in manner thereinafter expressed, the said *Charles Bankhead* had agreed to subject and charge the said policy in manner thereinafter mentioned, and also to execute such assignment of the reversionary estates and interest of him the said *Charles Bankhead* in the premises comprised in the said thereinbefore in part recited indenture of settlement as is thereinafter contained;—it is witnessed, that in pursuance of the said agreement, and in consideration of the premises, and for the nominal consideration therein mentioned, the said *Charles Bankhead* did subject and charge the said policy of assurance with the payment to the said *John Chatfield*, his executors, administrators, or assigns, of the said sum of 4708*l.* 12*s.* 10*d.*, including the said sums of 845*l.* and interest, and 3000*l.* and interest, so secured by the said indenture of the 1st *February* 1812, and deed poll, and such further sums of money as should or might thereafter be advanced or paid by the said *John Chatfield*, his executors,

1829.

CURLING v. SHUTTLEWORTH.

cutors, administrators, or assigns, to or on account of the said *Charles Bankhead*, or which should or might at any time thereafter become due or owing from the said *Charles Bankhead* to the said *John Chatfield* on any account whatsoever, with interest; subject nevertheless to a proviso for making void the said indenture, and every article, clause, matter, and thing therein contained, on payment by the said *Charles Bankhead*, his heirs, executors, or administrators, unto the said *John Chatfield*, his executors, administrators, or assigns, of the sum of 3780*l.* on the 1st *January* then next, with interest at 5 per cent. from the 1st day of *January* then last, and also on payment of 923*l.* 12*s.* 10*d.*, and of all such further sums as the said *John Chatfield* should pay for keeping on foot the said policy, or otherwise for the use or benefit or on account of the said *Charles Bankhead*, with interest: and the indenture also witnessed that, in further pursuance of the said agreement, the said *Charles Bankhead* did grant and assign to the said *John Chatfield*, his executors, administrators, and assigns, all those the reversionary estates or interests to which by virtue of the indenture of settlement therein recited he the said *Charles Bankhead* might eventually be entitled in the premises therein comprised, to hold the same unto the said *John Chatfield*, his executors, administrators, and assigns absolutely, subject nevertheless to the proviso or condition for redemption thereinbefore contained.

The said *John Chatfield* died subsequently to the date of the deed lastly above recited, having previously made his will, appointing the vendors of the policy in question, executors; and probate thereof was duly granted to such vendors.

The said *Charles Bankhead*, since the execution of the indenture of the 3d *June* 1822, executed mortgages of

or

or other incumbrances upon the policy in question to other persons.

The Plaintiff required that the title of such subsequent incumbrancers should be shewn, and that they and Dr. *Bankhead* should join in the assignment to the Plaintiff. The solicitors for the vendors declined to produce such title, or to procure the coucurrence of the incumbrancers and Dr. *Bankhead* in the assignment.

This action was thereupon brought by the Plaintiff against the Defendant to recover the amount of the deposit on the sale, being 322*l.*, and interest at 5 per cent. from the 15th *October* 1828, the day on which it was paid.

The question for the opinion of the Court was, Whether, under the circumstances stated in the case, a good title had been made to the policy sold to the Plaintiff? If the Court should be of opinion that a good title had not been made, the verdict for the Plaintiff was to stand; but its amount was to be reduced to such sum as the Court should think proper. And if the Court should be of opinion that a good title had been made, a nonsuit was to be entered.

Wilde Serjt. for the Plaintiff. The policy has not been sold under the power, and therefore the condition of sale has not been observed. When the mortgagor and mortgagee executed the third deed, and entered into a new contract and debt, without mention of the power in the second deed, the power was thereby extinguished. The third deed annulled the previous contract, and the time for sale under the power was past. Where a mortgagee sells without a power, he sells only the mortgage debt, with his interest in the policy, but not the policy itself. Such a sale leaves the mortgagor a right to redeem as against the purchaser; and if the life in the policy drops, the purchaser becomes a trustee

1829.

CURLING v. SHUTTLEWORTH.

for the mortgagor or his representatives for all beyond the sum due. As the purchaser had no means of knowing whether any thing had been paid under the second deed, he might be holding the policy, not absolutely, but merely as a security for what remained due upon the whole of the transactions between the mortgagor and mortgagee; so that the power being extinct, no absolute title to the policy could be conveyed without the concurrence of the mortgagor. Courts of equity lean against powers of sale. A power of sale for personalty is as a power of foreclosure for realty, and a purchaser cannot be safe without it.

Russell Serjt. *contrà*. First, the power of sale is not extinguished or affected by the third deed. Secondly, the vendors can sell and make a good title without that power.

The deed of 1822 refers to and recognises the deeds of 1812 and 1813 as existing securities; and it never could have been the intention of the parties, that the mortgagee should lose a portion of his security upon making an additional advance. The power was merely suspended for a short time in 1822, between the date of the deed of that year, and the day of forfeiture named in it.

No case or principle has been referred to under which a power can be said to be extinguished or destroyed upon a party's giving a further security.

The giving another security does not operate as an extinguishment of a former security, even by being pursued to judgment, unless it produce the fruits of a judgment. Thus it was held, that an action lay on a covenant for non-payment of money, notwithstanding a note had been given by the Defendant to the Plaintiff after the day of payment, "in payment and satisfaction of the debt," and judgment had been recovered on such note,

note, it not appearing that it was accepted, as well as given in satisfaction, or that it had actually produced satisfaction: *Drake* v. *Mitchell.* (*a*) So, a bond given in lieu of a covenant will not discharge the covenant. As in *Kaye* v. *Waghorn* (*b*): which was an action brought by the plaintiff against the defendant (who had sold to plaintiff some freehold premises) on a covenant that defendant and his wife should levy a fine. Plea, that after executing the conveyance, and before request to levy a fine, it was agreed between the parties, that defendant should give his bond conditioned for indemnifying the plaintiff against any claim of dower of defendant's wife, and that Plaintiff should accept the same in lieu and satisfaction of the said covenant, and in respect of the supposed breach thereof: averment, that he did execute the bond accordingly, and that the plaintiff accepted the same in lieu and satisfaction, and in discharge of the covenant. Demurrer; amongst other causes, that the bond was an instrument of the same nature as that on which the action was brought, and did not give the plaintiff a better or more summary remedy for any damage he might sustain by reason of the breach of covenant; and that the bond was not a defeazance of the covenant, nor an indemnity against all damages which the plaintiff might sustain by reason of the breach of covenant; and plaintiff had judgment.

Here, the remedy by sale would be taken away, and no better remedy would be given, if the covenant in the deed of 1813 be held to be extinguished.

It is a mistake to suppose that the conversion of interest into principal made a new debt: the conversion of interest into principal is in the nature only of a further advance. (*c*)

(*a*) 3 *East*, 251.
(*b*) 1 *Taunt.* 428.
(*c*) See *Coote on Mortgages*, 438, 439.

1829.

CURLING v. SHUTTLEWORTH.

The power of sale was only suspended by the deed of 1822. In *Cork* v. *Saunders* (*a*), where an insolvent by agreement (dated *March* 1816) assigned his property, the creditors consenting that the business should be carried on for their benefit till the next *Michaelmas*, and then that the property should be sold and divided amongst them, shortly after that *Michaelmas*, the creditors agreed that the business should be carried on for another year, viz. till *Michaelmas* 1817, upon the same terms and conditions as in the original agreement; it was not suggested that this arrangement, by which the sale and division of the property were suspended, had the effect of defeating the power of sale and division, but it was held even to bind a creditor who had signed the first agreement, but had not in any way concurred in the second.

If this were a sale under the power, the concurrence of the mortgagor cannot be required: *Clay* v. *Sharpe*. (*b*) The condition is express that the assignment shall be from the vendors only; viz. the executors of the mortgagee.

Secondly, the vendors can sell and make a good title without the power.

Even in equity, where the property mortgaged is reversionary, the Court does not decree a foreclosure, but a sale and satisfaction of the mortgagee's demand out of the produce: *How* v. *Vigurs* (*c*). So on the mortgage of an advowson, the mortgagee of the advowson may pray a sale: *Mackenzie* v. *Robinson*. (*d*) So if a mortgagor die, and his personal estate prove deficient to discharge the mortgage, the mortgagee may, on filing a bill to enforce payment of the money due, pray a sale

(*a*) 1 *B. & A.* 46.
(*b*) *Coote on Mortgages*, 132.
(*c*) 1 *Ch. Rep.* 33.
(*d*) 3 *Atk.* 559.

of

of the mortgaged estate in the first instance: *Daniel* v. *Skipwith* (*a*). *Powell* on *Mortgages*, 1094. And where there is a mortgage of personalty, a day being fixed for the repayment of money lent thereupon, the pledgee or mortgagee has in law or in equity, as the case may be, a right to sell, and to satisfy himself out of the proceeds. Thus, upon a mortgage of stock, when the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself, principal and interest, without any authority from the mortgagor, and without filing any bill for foreclosure: *Tucker* v. *Wilson* (*b*), *Lockwood and Others* v. *Ewer*. (*c*) And from *Lockwood* v. *Ewer* it seems, that a bill for a foreclosure in such a case would be dismissed. *Kemp* v. *Westbrook* (*d*) is to the same effect; viz. that a pawnee of stock is not bound to bring a bill of foreclosure of the equity of redemption of such stock, but may sell it.

And in general, though where a party has a simple lien on goods he cannot sell and dispose of them, yet, if he has a special property in those goods in trust for another, subject to a claim of his own, in such case he may sell in order to repay himself. *Per Holroyd* J. in *Cazenove* v. *Prevost*. (*e*)

The circumstance that the conditions of sale state a power of sale, cannot be a material if a good title can be made by other means.

The claim for interest is out of question, it never having been allowed on the recovery of deposit money: *Calton* v. *Bragg*. (*g*)

TINDAL C. J. The verdict ought to stand for the principal sum sought to be recovered. As to interest, the

(*a*) 2 *Br. Ch. Ca.* 155.
(*b*) 1 *P. Wms.* 261.
(*c*) 2 *Atk.* 303.
(*d*) 1 *Ves.* 278.
(*e*) 5 *B. & A.* 78.
(*g*) 15 *East*, 223.

1829.

CURLING v. SHUTTLEWORTH.

case is not one in which it has ever been allowed. With regard to the principal, the rule is, that where upon a sale there is such doubt upon the vendor's title as to render it probable the purchaser's right may become a matter of investigation, the Court will not compel him to complete the purchase. Here, according to the conditions of sale, the policy was to be sold under a power; the vendors, therefore, should have shewn an unquestionable power, for there are no means of calculating the compensation to be allowed in case of any mistake. Supposing the power to have been only suspended, there may be a candid doubt how far that suspension may be considered to operate in a court of equity, and if there be a reasonable degree of doubt, this Court will not expect the purchaser to proceed.

PARK J. I am of the same opinion. We ought not to drive parties into courts of equity. As to the claim for interest, ever since the case of *Calton* v. *Bragg*, it has been holden that interest cannot be recovered upon a mere deposit. In *Farquhar* v. *Farley* (*a*), it was holden, indeed, that the purchaser might allege and recover against the vendors special damage for the loss of interest on a deposit repaid for insufficiency of title in the vendor; but in *Lee* v. *Munn* (*b*) it was decided, that at all events an auctioneer is not liable to pay interest on a deposit.

BURROUGH J. Unless it be proved that the auctioneer has made interest of the money, no interest can be demanded. As to the principal question, if there be reasonable doubt as to a title, we cannot compel a party to take it. Here, there is not only doubt, but,

(*a*) 7 *Taunt.* 592. 1 *B. Moore*, 323.
(*b*) 1 *B. Moore*, 481. 8 *Taunt.* 45.

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in my opinion, the power is gone by, not being mentioned in the third deed.

GASELEE J. concurred in giving Judgment for the Plaintiff.

HETHRINGTON *v.* GRAHAM.

July 6.

Adultery is a bar to dower, although committed after the husband and wife have separated by mutual consent.

THE demandant, in this case, counted upon a writ of dower *unde nihil habet*, to which the tenant pleaded in bar, that the demandant, in the lifetime of her late husband, and during her coverture with him, voluntarily, and of her own accord, left her husband, and from thence until the time of his death voluntarily and of her own accord lived away from him, and during her coverture with her said husband, continually, until the death of one *William Coulson*, of her own accord, and without the licence or consent, and against the will of her husband, lived away from her said husband in adultery with the said *William Coulson*. And the plea further alleged, that the husband was not at any time after the demandant left his house, or after she lived in adultery with the said *William Coulson*, voluntarily or in any manner reconciled to her. To this plea the demandant replied, that although true it was that she voluntarily and of her own accord left her husband, yet that she left him with his consent for that purpose granted, and separated and parted from her husband, and that such separation continued with their mutual consent until the husband's death, and that if any act of adultery took place, the same took place after such her separation and parting from her husband, and during the period of such separation by their mutual consent. The tenant

1829.

HETHRINGTON v. GRAHAM.

in his rejoinder merely re-asserted the fact, that the demandant of her own accord, and without the licence or consent of the husband, lived in adultery with the said *W. Coulson.* To which rejoinder there was a general demurrer.

Wilde Serjt. for the Plaintiff. The plea is ill: the adultery, under the circumstances stated in it, being no bar of dower. Adultery being an offence cognizable by the ecclesiastical court only, is no bar of dower at common law. 2 *Inst.* 435. But by 13 *Ed.* 1. *c.* 34. it is enacted, that if a wife willingly leave her husband, and go away and continue with her advouterer, she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon. It is not easy to discover the principle of this enactment; for it has been held, that if the husband receive his wife again, or if he grant her with all her goods, she does not lose her dower. 2 *Inst.* 435. The statute, therefore, creating a forfeiture, must be construed strictly; *Kent* v. *Whitby* (*a*); and can only be enforced where all the terms of the enactment are complied with. Adultery of itself will not occasion a forfeiture. The wife must go away with her adulterer willingly; must continue with him, and be thereupon convict.

The present plea does not state that she eloped with her adulterer, or that she was convicted thereupon. All the precedents aver at least the elopement with the adulterer. *Haworth* v. *Herbert* (*b*), *Rastal*, 230. *Lib. Intrat.* fo. 20. 9 *Vin. Abr. Dower.* No plea can be found resembling the present.

Jones Serjt. *contrà.* The principle of the statute is the protection of public morals, and the punishment of

(*a*) 4 *Bro. P. C.* 362. (*b*) 2 *Dyer*, 106 *b.*

the

the offence of the wife; and the concurrence of all the modes of committing the offence specified in the act is not essential to a forfeiture. Lord *Coke* says, 2 *Inst.* 434. "Albeit the words of this breach be in the conjunctive, yet if the woman be taken away not *sponte*, but against her will, and after consent, she shall lose her dower: for the cause of the bar of her dower is not the manner of her going away, but the remaining with the adulterer in adultery without reconciliation, that is the bar of the dower:" and in *Paynell*'s case (*ibid.*), where the plea stated that the wife left her husband, and lived as an adulteress with Sir *W. Paynell*, the bar was held sufficient, although there was no allegation that she eloped with Sir *W. Paynell*. So, if she elope with the adulterer, she loses her dower although she do not remain with him, or remain by constraint. (*ibid.*) And in *Chambers* v. *Caulfield* (*a*), it was held, that a husband might maintain an action for criminal conversation with his wife, although he was living separately from her under a deed of separation. In *Coot* v. *Berty* (*b*), and in *Govier* v. *Hancock* (*c*), it was held that a husband was not bound to receive his wife after she had committed adultery, although he had been the aggressor, and had turned her out of doors. "If she be thereupon convicted," means only if the fact be proved. None of the entries allege conviction in form.

Wilde in reply. If the single act of adultery is to occasion forfeiture, the cases in which it has been holden that the wife retains her dower notwithstanding adultery, must be overruled; and the principle of public morals is hardly consistent with the case of the husband's granting the wife with her goods, or his receiving her again after an act of adultery; in neither of which

(*a*) 6 *East*, 244. (*b*) 12 *Mod.* 232. (*c*) 6 *T. R.* 603.

cases

1829.

HETHRINGTON v. GRAHAM.

cases does she forfeit her dower: it may, therefore, be contended, that elopement with the adulterer is essential to the forfeiture according to the statute.

Cur. adv. vult.

TINDAL C. J. The question raised upon the pleadings for the judgment of the Court is this: Whether, under the statute 13 *Ed.* 1. *c.* 34., commonly called the statute of *Westminster* the 2d, the committing an act of adultery, and continuing with the adulterer, is any bar to the wife's right to dower, where she has previously left her husband with his consent, and is living apart from him with such consent at the time of the adultery; or, whether it is necessary, in order to satisfy the words of the statute, that the original leaving of her husband should be a leaving with the adulterer by his means or persuasion.

That the adultery of the wife was no bar of the wife's dower at common law, is expressly laid down by Lord *Coke* in his reading on this statute in 2 *Inst.* p. 435. Indeed, it could not have been otherwise, as adultery is an offence of ecclesiastical jurisdiction only, and of which the courts of common law took no cognizance. As well, however, for the purpose of preventing that offence, as more probably with the view of protecting the heir against the danger of introducing a supposititious offspring into the family, it is enacted by the thirty-fourth chapter of the statute, "that if a wife willingly leave her husband, and go away and continue with her advowterer, she shall be barred for ever of an action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon," except in an event which has not happened in this case, and to which it is therefore unnecessary to advert. It is somewhat singular that throughout the whole of this long statute, consisting of fifty chapters, this is the only one in the old law *French*, the

the whole of the others being in *Latin*; and even this chapter changes from the law *French* to *Latin*, just at the place where this subject begins.

The chapter, however, after making a distinction between the carrying away women without force and with force, and enacting a punishment for those offences, provides for the case now in question, viz. that of the woman leaving her husband willingly, and continuing with her adulterer, in the words above cited.

Now it is contended on the part of the demandant, that each part of the description of the offence contained in the act must be taken to be cumulative; so that the dower is not barred unless the wife has left her husband willingly with the adulterer; has gone away with him, and has also continued with him. Whilst, on the part of the tenant, it is insisted, that it is sufficient to bring the case within the statute if the wife has of her own consent left the society of her husband, and, after she has so left him, commit the act of adultery; and the Court is of the latter opinion.

It may be admitted, as the fact is, that in all the ancient precedents the leaving of the husband by the wife is stated to have been "with the adulterer." See *Lib. Intrationum*, fo. 20. *Rastal*, 230. *Dyer*, 107. But we think this is not conclusive on the point; for, as there can be no doubt that the case is within the statute where all these circumstances concur, so the pleader would of course insert them where the facts of the particular case warranted the insertion. And, on the contrary, there is direct authority that *all* the circumstances mentioned in the statute need not concur in form, provided they do so in substance; for Lord *Coke* lays it down in 2 *Inst.* 434., that, "Albeit the words of this branch be in the conjunctive, yet if the woman be taken away, not *sponte*, but against her will, and *after* consent, and remain with the adulterer without being reconciled, &c.

1829.

HETHRINGTON v. GRAHAM.

&c. she shall lose her dower; for the cause of the bar of her dower is not the *manner of the going away*, but the remaining with the adulterer in avoutry without reconciliation, that is the bar of the dower." And this appears more evident by the case of Sir *John Camoys*, cited in 2 *Inst.* 434., where the plea states that the wife left her husband in his life, and lived as an adulteress with Sir *W. Paynel*, and the replication took issue that she did not live as an adulteress with the said Sir *W. P.*, wherein the bar was held good, though there was no allegation that she left with the adulterer: and it ought not to be forgotten that *Britton*, whose book was published immediately after the framing of this statute, speaking of a writ of dower brought against the heir and his guardian, says, " He may say she hath forfeited dower of her husband by her adultery; for she went from her husband to another bed after she had married him, and so forfeited her dower." Now here no mention is made of a leaving of the husband, either willingly or with any particular person, but the plea states only in substance that the wife was living apart from her husband in adultery. The authorities, therefore, above referred to, place the forfeiture of the dower upon the fact of a living from the husband in adultery, and not upon the circumstances attending the elopement; and as we think the good sense and reason of the case concur with these authorities, we hold the proper construction of the statute to be what the words still will warrant, that if a woman leaves her husband with her own free will, and afterwards lives in adultery, the dower is forfeited. We therefore hold the plea in bar in this case to be sufficient, and give judgment for the tenant.

Judgment for the Tenant.

1829.

KEMBLE *v.* FARREN.

July 6.

ASSUMPSIT by the manager of *Covent Garden* Theatre against an actor, to recover liquidated damages for the violation of an engagement to perform at *Covent Garden* for four seasons.

Liquidated damages cannot be reserved on an agreement containing various stipulations, of various degrees of importance, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined.

By an agreement between the Plaintiff and Defendant, the Defendant had engaged himself to act as a principal comedian at *Covent Garden* Theatre for four seasons, commencing with *October* 1828, and in all things to conform to the regulations of the theatre. The Plaintiff agreed to pay the Defendant 3*l.* 6*s.* 8*d.* every night on which the theatre should be open for theatrical performances during the ensuing four seasons; and that the Defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, *or any part thereof, or any stipulation therein contained,* such party should pay to the other the sum of 1000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount; and which sum was thereby declared by the said parties *to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.*

The breach alleged was, that the Defendant refused to act during the second season; and at the trial the jury gave a verdict for the Plaintiff for 750*l.* damages, subject to a motion for increasing them to 1000*l.*, if the Court should be of opinion that, upon this agreement, the

1829.

KEMBLE v. FARREN.

the Plaintiff was entitled to the whole sum claimed as liquidated damages.

Wilde Serjt. having accordingly obtained a rule *nisi* to that effect,

Spankie Serjt. shewed cause. Upon this agreement the Plaintiff is not entitled to recover 1000*l.* for liquidated damages, but only such compensation as a jury shall think fit. The rule is, that where an agreement contains several stipulations, some of them touching matters of great importance to the parties, and others, matters of little or no importance, a covenant for liquidated damages, generally, upon any violation of the agreement, shall not be carried into effect, however strong the language may be. But if the agreement consist only of a single stipulation, or the covenant for liquidated damages be confined to any specified breach or breaches where the agreement contains more than one stipulation, such covenant is valid, and may be enforced. And this is no violation of the rule, that written instruments shall be construed according to the intention of the parties; for the parties must be taken to have overlooked the effect of their words, when by a general covenant for liquidated damages, they propose such an absurdity as the payment of a sum disproportionately heavy for an omission to observe the most unimportant part of an agreement.

For instance, it might probably have been intended between the parties in this case, that the Defendant should forfeit 1000*l.* if he quitted *Covent Garden* Theatre, and joined a rival establishment; but it never could have been in the contemplation of the parties, that he should forfeit 1000*l.* if he neglected to attend a single rehearsal, or that the Plaintiff should forfeit 1000*l.* if he omitted to pay the Defendant the salary for one night,

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3*l.* 6*s.* 8*d.* But as the stipulation for liquidated damages is general, and applies in terms equally to the minutest as well as the most important violations of the agreement, the Court has no means of determining to which breach the parties meant it should be actually applied, and must, therefore, leave it to a jury, to ascertain the probable amount of damage. The leading case on the subject is *Astley* v. *Weldon* (*a*), where the manager of a theatre sued an actress on the breach of an agreement to perform. That agreement also contained a general stipulation for liquidated damages in terms as strong as the present, and *Heath* J. said, "Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." *Chambre* J. said, "There is one case in which the sum agreed for must always be considered as a penalty, and that is, where the payment of a smaller sum is secured by a larger. In this case it is impossible to garble the covenants, and to hold that in one case the plaintiff shall recover only for the damages sustained, and in another that he shall recover the penalty. The concluding clause applies equally to all the covenants." And *per Eldon* C. J. "There are many instances of the defendant's misconduct which are made the subject of specific fines by the laws of the theatre. Are we, then, to hold that, if the defendant happens to offend in a case which has been so provided for by those laws, she shall pay only 2*s.* 6*d.* or 5*s.*; but if she offend in a case which has not been so provided for, she shall pay 200*l.*?"

(*a*) 2 *B.* & *P.* 346.

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1829.

KEMBLE v. FARREN.

That case has been recognized in *Street* v. *Rigby*. (*a*) In *Lowe* v. *Peers* (*b*) the contract had but a single object, that the defendant should marry the plaintiff, who, therefore, recovered the liquidated damages provided by the contract. And in *Reiley* v. *Jones* (*c*) the whole object of the agreement was, that the defendant should transfer to the plaintiff his interest in a public-house. *Park* J. put the judgment of the Court upon this footing. In *Barton* v. *Glover* (*d*), *Farrant* v. *Olmius* (*e*), and *Crisdee* v. *Bolton* (*f*), the agreements for liquidated damages were all confined to some specific breach. The Court has no power to select one out of the various stipulations contained in this agreement, and apply the liquidated damages to that. The whole agreement must be taken together. In *Davies* v. *Penton* (*g*), *Bayley* J. said, "We must look at all parts of the instrument, in order to ascertain whether it was the intention of the parties that the sum of 500*l.* should be a penalty or liquidated damages. Now, where the sum which is to be the security for the performance of an agreement to do several acts will, in cases of breaches of the agreement, be in some instances too large, and in others too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty." *Holroyd* J. "We must look to the nature of the agreement, and of the sum to be paid, in order to ascertain whether the sum which was to secure the performance of the agreement was intended to be a penalty or liquidated damages." *Littledale* J. "Since the statute 8 & 9 *W.* 3. parties in framing agreements have frequently changed the word *penalty* for *liquidated damages*; but the mere

(*a*) 6 *Ves.* 815.
(*b*) 4 *Burr.* 2225.
(*c*) 1 *Bingh.* 302.
(*d*) *Holt, N. P. C.* 42.
(*e*) 3 *B. & A.* 692.
(*f*) 3 *Carr. & P.* 240.
(*g*) 6 *B. & C.* 216.

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1829.

KEMBLE v. FARREN.

alteration of the term cannot alter the nature of the thing; and if the Court see, upon the whole agreement, that the parties intended the sum to be a penalty, they ought not to allow one party to deprive the other of the benefit to be derived from the statute." And in *Randal* v. *Everest* (*a*), where an agreement not under seal, for the lease of a public house, contained a clause that the party neglecting to comply with his part of the agreement should pay the sum of 100*l*., mutually agreed upon to be the damages ascertained and fixed on breach thereof, it was held, that the party making a default was not liable beyond the damages actually sustained. Lord *Tenterden* laid it down, that "whether the term *penalty* or *liquidated* damages be used in the agreement, a party who claims compensation for default shall only be allowed to recover what damage he has really sustained." The exaction of liquidated damages would be the more severe in the present instance, as the Plaintiff has had the benefit of the Defendant's services for a considerable proportion of the time agreed on; and it is contrary to every principle of contracts, that a party should have performance *pro tanto*, and a penalty too. *Pothier* (*b*) says, "I cannot receive the whole of the penalty, and enjoy in part the benefit of my right of servitude: I cannot, at the same time, have the one and the other."

Wilde Serjt. *contrà*. In all cases the rule is, to collect the intention of the parties from the language of the agreement, and not to decide what is reasonable or unreasonable, for on that no two persons would be found to agree. On the contrary, if a contract be never so unreasonable, the Court will sustain it, provided it appears clearly to have been the intention of the parties

(*a*) 1 *M.* & *M.* 41.
(*b*) *Traites des Obligations*, part 2. cap. 5. art. 3. pl. 351.

1829.

KEMBLE v. FARREN.

to carry it into effect. In *Astley* v. *Weldon*, the Court treated the question of liquidated damages purely as a question of intention; and Lord *Eldon* said, "If a party choose to stipulate for 5*l.* or 50*l.*, addditional rent, upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract; and it appears to me extremely difficult to apply with propriety the word *excessive* to the terms in which parties choose to contract with each other." Although the sum fixed in the present instance may appear somewhat exorbitant, when applied to slight violations of the contract, the parties probably fixed it on the whole agreement, on account of the difficulty of ascertaining the damages in matters regarding theatrical performance. It would be difficult, if not impossible, to prove the precise sum the Plaintiff would lose by the Defendant's neglecting to attend rehearsals, and so, performing imperfectly the parts allotted to him, or by his transferring his services to a rival establishment. In *Reiley* v. *Jones*, the Court decided on the ground that the parties had one paramount object in the agreement, and that the defendant had violated the agreement in respect of that object. The paramount object between these parties was, that the Plaintiff should retain the Defendant in his theatre, and that the Defendant should not transfer his services to a rival establishment; the Defendant has violated the agreement in that respect. The language in which the liquidated damages are agreed to be paid is the strongest that can be employed; it manifests the clearest intention that the parties shall abide by it; and if it be not sufficient to secure the payment, there is no language and no contract by which they can be secured. *Davies* v. *Penton* turned on the circumstance, that the defendant had waived his right to insist on liquidated damages.

Cur. adv. vult.

TINDAL

1829.

KEMBLE v. FARREN.

TINDAL C. J. This is a rule which calls upon the Defendant to shew cause why the verdict, which has been entered for the Plaintiff for 750*l.*, should not be increased to 1000*l.*

The action was brought upon an agreement made between the Plaintiff and the Defendant, whereby the Defendant agreed to act as a principal comedian at the Theatre Royal, *Covent Garden*, during the four then next seasons, commencing *October* 1828, and also to conform in all things to the usual regulations of the said Theatre Royal, *Covent Garden*; and the Plaintiff agreed to pay the Defendant 3*l.* 6*s.* 8*d.* every night on which the theatre should be open for theatrical performances, during the next four seasons, and that the Defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of 1000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.

The breach alleged in the declaration was, that the Defendant refused to act during the second season, for which breach, the jury, upon the trial, assessed the damages at 750*l.*; which damages the Plaintiff contends ought by the terms of the agreement to have been assessed at 1000*l.*

It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of 1000*l.* should be taken as liquidated damages, but

1829.

KEMBLE v. FARREN.

negatively also that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at 1000*l.* For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the Plaintiff had neglected to make a single payment of 3*l.* 6*s.* 8*d.* per day, or on the other hand, the Defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of 1000*l.* But that a very large sum should become immediately payable, in consequence of the nonpayment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express and

and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case, in principle, from that of *Astley* v. *Weldon*, in which it was stipulated, that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of 200*l.*, to be recovered in his Majesty's courts at *Westminster*. Here there was a distinct agreement, that the sum stipulated should be liquidated and ascertained damages: there were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments; the action was brought for the breach of a clause of an uncertain nature; and yet it was held by the Court, that for this very reason it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right to adhere to it, and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it. The consequence is, we think the present verdict should stand, and the rule for increasing the damages be discharged.

Rule discharged.

1829.

(IN THE EXCHEQUER CHAMBER.)

June 26. CAPEL and Another *v.* BUSZARD and Others, Assignees of JONES and Another, Bankrupts.

It was stated in a special verdict, that by an indenture, *A.* demised to *B.* all that wharf next the river *Thames* described by abutments, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the said wharf belonging; and that by the indenture the exclusive use of the land of the river *Thames* opposite to and in front of the wharf, between high and low water mark, as well when covered with water, as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but that the land itself between high and low water mark was not demised: Held, that the lessor could not distrain, for rent in arrear, barges, the property of *B.*, lying in the space between high and low water mark, and attached to the wharf by ropes.

TROVER for two barges; first count on the possession of the assignees. Plea, not guilty. At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Trinity* term, 1827, the jury found a verdict of not guilty on the first count; and on the second a special verdict, stating, as to the grievances in that count mentioned, that, at the time of making the distress thereinafter mentioned, *W. R. Jones* and *G. Jones* had become bankrupts, and the Plaintiffs had been chosen and appointed their assignees; that the Plaintiffs, as such assignees, before and at the time of the distress thereinafter mentioned, were lawfully possessed, as of their property as such assignees, of the barges thereinafter mentioned to have been taken and distrained by the Defendants; and that by an indenture dated the 9th of *March* 1816, and made before *W. R. Jones* and *G. Jones*, or either of them, became bankrupts, between one *T. Brown* of the one part, and the bankrupts of the other part, *Brown* demised, leased, &c. to the bankrupts all that wharf, ground, and premises next the river *Thames*, and also all that capital brick-built

warehouse

1829.

CAPEL v. BUZZARD.

warehouse of three floors erected and built thereon, abutting north on the river *Thames*, east on premises in the occupation of *T. Flockton*, south on the street, cartway, and common highway leading from *Pickle Herring Stairs* to *Horsleydown Stairs*, and west on *Fivefoot Way* or *Little Wharf*, for landing goods; and certain other premises in the indenture more particularly mentioned; together with free liberty for them, the bankrupts, their executors, &c. during that demise, to land and load goods, &c. in common with the rest of the tenants of *Brown* at the said *Fivefoot Way* or *Little Wharf* fronting the river *Thames*; together with all cellars, ways, paths, passages, lights, easements, profits, commodities, and appurtenances whatsoever to the said wharf, ground, warehouse, and premises, or any of them, belonging or appertaining; *habendum*, the same premises, with their and every of their appurtenances unto the bankrupts, their executors, &c. from the 22d of *March* then past, for the term of thirteen years, at the yearly rent of 555*l*., by equal quarterly payments, payable to *Brown*, and after his death to the person who should be entitled to the freehold of the premises. The special verdict then stated, that by the indenture, the exclusive use of the land of the river *Thames*, opposite to and in front of the said wharf-ground between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the said wharf, ground, and premises, but that the land itself between high and low water mark, was not demised; that on the 12th of *November* 1826, the sum of 555*l*. of the rent was in arrear and unpaid; and that on that day, and at the time of making the distress thereinafter mentioned, the two barges, the property of the Plaintiffs as such assignees, were attached by ropes, head and stern, to the wharf-ground aforesaid, and were lying and being

1829.

CAPEL v. BUSZARD.

on the part of the river *Thames* opposite to and in front of the said wharf, ground, and premises, and between high and low water mark, the exclusive use of which was demised as aforesaid; that the Defendants, on the said 12th *November*, as the bailiffs of the person who was then entitled to the freehold of the wharf and premises, and was duly authorized by law to distrain for the arrears, seized and took the two barges as a distress for the arrears of rent, and shortly afterwards sold and disposed thereof to satisfy such arrears.

Judgment having been given in favour of the Plaintiffs below, the case was brought into the Exchequer Chamber on error.

Starr, for the Defendants below. The exclusive use found by the special verdict is a certain and determinate interest or profit, in contradistinction to a profit to be taken in an uncertain place, or to a mere easement, which latter could not be described in the old precedents as appendant or appurtenant; *Godley* v. *Frith* (*a*); but in this case, the right of the lessee between high and low water mark is found by the special verdict to be appurtenant. It may be a substantial and tangible interest whereto a lessor may resort to distrain, and yet be appurtenant to land. The technical rule is only that land shall not be appurtenant to land. In *Co. Lit.* 121 *b.* it is said, that prescription doth not make any thing appendant or appurtenant, unless the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant, as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. Mr. *Butler*, in his note to this passage, after adverting to some examples to shew that this position is not universally true, says, "The true test

(*a*) *Yelv.* 159.

seems

seems to be the propriety of relation between the principal and the adjunct, which may be found out by considering whether they so agree in nature and quality as to be capable of union without any incongruity." In this case the principal is the wharf; the exclusive right to use the land between high and low water mark is the adjunct. They agree in nature and quality, so as to be capable of union without any incongruity; one, therefore, may be appurtenant to the other.

But assuming this to be an incorporeal interest, the same remedies are applicable to the recovery of it, and the same consequences at law attach on the demise of it, as upon that of the corporeal principal. It is an interest for the recovery of which an assize of *novel disseisin* would lie at common law; that is, a writ of entry, wherein *A.* complains that *B.* hath disseised him of his freehold, and the sheriff is to cause that *tenement* to be reseised, and twelve men to view that tenement, &c. (*a*) *Bracton*, in his chapter on the assize of *Novel Disseisin*, lib. 4. fol. 164., says, "Locum autem non solum habet hujusmodi assisa in rebus corporalibus sicut in *tenementis* quibuscunque; verum etiam in rebus *incorporalibus* sicut *in servitutibus et in rebus quæ pertinent ad tenementum* sicut in jure pascendi, falcandi, fodiendi et hujusmodi." And again in fol. 176., "In quibus casibus omnibus subvenitur disseisito per breve de ingressu secundam formas inferius notandas, tam super possessionibus rerum corporalium, quam super juribus, scilicet rebus incorporalibus sicut super jure pascendi et hujusmodi utendi fruendi." Here the lessee had the *jus utendi*, for he had the exclusive right of using the land between high and low water mark. Again, wherever a view could be had of tenements, among which are servitudes, an assize lay for the recovery of the rent,

(*a*) *Fitz. N. B.* 177.

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1829.

CAPEL v. BUSZARD.

and even a distress might be made upon a *servitus* for the rent of the *servitus*, provided it were practicable, *Bracton*, lib. 4. fol. 181. It has been said that assize lay in these instances only, because it was a speedy remedy; but *Bracton*, lib. 4. fol. 181., says, that it lies only where strictly applicable; and, therefore, if the complainant is ignorant of, or cannot describe his tenement, either in quality or quantity, or its local situation, the writ of assize of *novel disseisin* will not lie. The remedy by assize of *novel disseisin* was extended by the statute of *Westminster*, 2d. Lord *Coke*, in commenting on that statute, in 2 *Inst.* 412., observes, that *Bracton*, who wrote before the making of the act, says, that the assize lay for any common appurtenant to the freehold, as for common of pasture or of turbary; and then, "That in the reign of *Henry* III., which was before the making of that act, an assize did lie of common of piscary; and these opinions had great probability of reason, yet, because (as hath been said) there was no writ in the register in those cases, therefore, before this act, no writ did lie by the general opinion of the judges; but now this act hath cleared the question." And *Bracton*, when he mentions the writ of entry, *ad terminum qui præteriit*, lib. 4. fol. 324., asserts, that it will lie for common of pasture, *dum tamen pastura fuerit certa et designata ad certum numerum averiorum*. These writs of entry, therefore, are applicable, the one to that interest in land stated in the special verdict, the other to that right of common which the same interest is admitted to resemble.

Then, the same consequences attach upon the demise of it as upon that of the corporeal hereditament. The lessee has acknowledged under his hand and seal that this appurtenant is part of the premises demised, in respect of which the rent is reserved. The power of distress is incident to and inseparable from rent service,

service, and to that power there are no stricter limits than the following, which are given in *Fleta*, lib. 2. c. 49., "In qualibet captione tria principaliter requiruntur, certus locus, certa causa, et seisina alicujus." In the present case, all these three requisites concur. *Littleton*, sect. 58., does not confine the right of distress to lands, but says, "If the lessor reserve to him a yearly rent upon such lease, he may choose for to distrain for the rent in the *tenements letten*." Lord *Coke*, in commenting on this passage, says, that the rent must be reserved out of the lands or tenements whereunto the lessor may have resort to distrain. The reason given by Lord *Coke*, therefore, why the rent should be reserved out of the lands and tenements is, that there should be a certain place to distrain upon. He afterwards proceeds to say, that a rent cannot be reserved by a common person out of an incorporeal inheritance, as tithes, &c.; but if lease be made of them by deed for years, it may be good, by way of contract, to have an action of debt, but distrain the lessor cannot." This dictum, that it is good by way of contract only, is at variance with what was said by the Court in *Bally* v. *Wells* (*a*), where tithes were held to be such an estate as would create a privity between the lessor and assignee, so as to make the latter liable upon a covenant running with the tithes. There, it was objected tithes were incorporeal, and could not support a covenant by the lessee thereof, to run with them, so as to bind the assignee. But the Court, in delivering judgment, say, "There seems to be no difference between an inheritance in *lands* and tithes as to this matter. Tithe is a tenth part of the profits of the *lands*; the profit of the land is the land itself; tithes are tangible and visible; may be put in view in an assize; an ejectment lies of them; a *præcipe quod reddat* lies of a portion of tithes: a war-

(*a*) 3 *Wils.* 25.

ranty

1829.

CAPEL v. BUSZARD.

ranty may be annexed to incorporeal inheritances: they have every property of an inheritance in land, except that they lie in grant, and not in livery." Those observations apply obviously to the nature of the interest which the lessee took in the space between high and low water mark. Again, beasts upon the common might, at common law, be distrained for the rent of the common. In the Year Book, 26 *Hen.* 8. p. 5., this case is stated, "In replevin defendant avowed that plaintiff and his ancestors, &c. had used to have common in certain acres of the defendant, for which rent was reserved at the festival of *Christmas*, which rent was in arrear, and avowed the taking. *Mervin.* Sir, it seems to me that the prescription availeth not, for he prescribes to distrain in his own soil, which would be inconvenient. *Fitzherbert.* It is a good prescription, and may have a lawful beginning: the soil is not charged with the distress, but only the beasts. Afterwards, on another day, *Mervin* moved *Englefield* on the same point, who said as *Fitzherbert* had said." In *Gray's* case (*a*), it was resolved that the lord might distrain cattle for the rent of a common on a common, although there was no prescription to distrain. In the Mayor of *Northampton's* case (*b*), *Lee* C. J. seems to have thought that the owner of the soil might distrain even for stallage, provided the sum were fixed. These authorities shew that there may be a distress for rent issuing out of an interest analogous to that which the lessee took under the indenture in the space between high and low water mark. The exclusive use found by the jury was inferred from those acts of enjoyment of which this soil is capable, such as making beds for the barges, clearing out the mud, &c. The interest of the tenant may be likened to the vesture of land which may be distrained upon. *Co. Lit.* 47 *a.*; or to those particular

(*a*) 5 *Rep.* 78. *S. C. Cro. Eliz.* 405. (*b*) 1 *Wils.* 115.

rights

rights for any injury to which trespass will lie, as a right to the herbage; or a piscary, *Co. Lit.* 4 *b.*, *Wilson* v. *Mackreth* (*a*), *Welsh* v. *Myers.* (*b*) These barges, although not "in and upon" the wharf ground, would have had no certain local habitation but for the wharf ground to which they were attached. If these barges were lawfully distrained, when the privilege of being so attached only was demised (as the Court of Common Pleas decided in this very case (*c*) *à fortiori*, a distress of them is lawful when the tenants were in the occupation of the interest stated in this special verdict. They occupied the premises demised according to the mode of occupation of which they were capable.

Richards for the Plaintiffs below. The Defendants below could not, by law, distrain the barges while they were between high and low water mark, because a distress can only be made on the land out of which the rent issues, and here the rent did not issue out of the land between high and low water mark. That land was not demised, but only an exclusive right to use it. That was a mere easement. In *Co. Lit.* 47 *a.* it is said, "that it appeareth by *Littleton* that a rent must be reserved out of the lands or tenements whereunto the lessor may have resort or recourse to distrain, as *Littleton* here also saith, and, therefore, a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, corodies, mulcture of a mill, tithes at fairs, markets, liberties, *privileges*, franchises, and the like. But if the lease be made of them by deed for years, it may be good, by way of contract, to have an action of debt, but distrain the lessor cannot." Here the land between high and low water mark is not demised, but a mere right to use it. That is a privilege or easement, and, consequently, no rent can

(*a*) 3 *Burr.* 1824. (*b*) 4 *Campb.* 368. (*c*) 4 *Bingh.* 137.

issue

1829.

CAPEL v. BUSZARD.

issue out of it. The 11 *G.* 2. *c.* 19. *s.* 8. enables the landlord to distrain any cattle feeding upon a common appurtenant to the land demised. At common law such cattle could not be distrained, because the soil of the common belonged to the lord of the fee; and the lessor of the land (to which the right of common is appurtenant) could not, therefore, enter on the common land to distrain. So, in this case, the soil of the land between high and low water mark belongs to the king. The lessor of the wharf, therefore, can have no right to distrain on that land, though he may have, as appurtenant to his own land, an exclusive right to use the space between high and low water mark. There are cases where land having been demised for a term of years, and the lessee having had reserved to him a right of using part of the demised premises after the expiration of the term, his crops have been held to be subject to distress so long as they continued on the land, as in *Boraston* v. *Green* (*a*), and *Knight* v. *Benett*. (*b*) But in those cases the land itself on which the distress was made was originally demised, and not the mere use of it, as in this case.

Cur. adv. vult.

ALEXANDER C. B. This is an action of trover for two barges, brought by the assignees of bankrupts of the name of *Jones*, against two Defendants, who were bailiffs, duly authorised, of the person then entitled to the freehold of a wharf and premises in possession of the Plaintiffs below, the assignees, and who had seized the two barges under colour of distress for rent arrear.

The distress was made upon the two barges lying in the river *Thames*, but attached by ropes to the wharf demised by the principal of these bailiffs, the Defendants below, to the bankrupt now represented by the assignees. The question is, Whether the distress is valid? There

(*a*) 1 *H. Bl.* 5. (*b*) 3 *Bingh.* 364.

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is no doubt that the wharf was demised, that rent was in arrear, and the distress made.

The controversy is, whether the barges were in a position which rendered them liable to be distrained upon.

It is necessary to examine the terms of the demise to determine the nature of the interest which the tenant took under the demise in the place where the barges were at the time of the distress, and then to decide whether by law property in that place was liable to be distrained upon. The jury found a special verdict, where the terms of the demise are stated. In substance they are as follows: — By indenture *Brown* demised to the bankrupts all that wharf, ground, and premises next the river *Thames*, and also all that warehouse abutting north on the *Thames*, &c., together with licence for them during that demise to land and load goods in common with the rest of the lessor's tenants at *Fivefoot Way Wharf*; together with all easements and appurtenances to the said wharf and premises belonging or appertaining: — the special verdict then stated, that by the indenture the exclusive use of the land of the river *Thames* opposite to and in front of the demised wharf between high and low water mark, as well when covered with water as dry, was demised as appurtenant to the wharf, but that the land between high and low water mark was not demised. It has been observed that the special verdict is in this place erroneous and inconsistent with itself. It finds that the exclusive use of the land over which the river flows *was demised as appurtenant to the wharfs*, but that the land itself was *not* demised. This inconsistency has suggested to one of the Judges the propriety of a *venire de novo*. It is agreed that the finding is inconsistent, because a grant of the exclusive use of the land is a grant of the land. Therefore the verdict finds that the land was demised, and that it was not demised. But still the majority of the Judges are of opinion that there

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1829.

CAPEL v. BUSZARD.

is no occasion for a *venire de novo*: such a step would, in their opinion, occasion useless delay and expense. The jury have put a construction upon the instrument. The instrument is itself sufficiently set out upon the special verdict, and the Court can judge of its legal effect. They are now informed as exactly what the facts are as they could be by any amendment, and, therefore, do not deem it necessary that there should be a *venire de novo*. The special verdict then proceeds, "That on the 12th *November* 1826, the sum of *555l.* of the rent was in arrear and unpaid; and, that on that day, and at the time of making the distress thereinafter mentioned, the two barges, the property of the Plaintiffs as such assignees, were attached by ropes, head and stern, to the wharf ground aforesaid, and were lying and being on the part of the river *Thames*, opposite to and in front of the said wharf, ground, and premises, and between high and low water mark, the exclusive use of which was demised as aforesaid; that the Defendants, on the said 12th of *November*, as the bailiffs of the person who was then entitled to the freehold of the wharf and premises, and was duly authorized by law to distrain for the arrears, seized and took the two barges as a distress for the arrears of rent, and shortly afterwards sold and disposed thereof to satisfy such arrears." Such is the verdict. Nothing is demised but the wharf, ground, and premises next the river *Thames*, and the capital built brick warehouse of three floors, erected and built thereon, together with the "Cellars, sollars, rooms, chamberways, paths, passages, lights, easements, profits, commodities, advantages, and appurtenances whatsoever, to the said wharf, ground, warehouse, and premises belonging or appertaining."

What is demised, therefore, is the wharf, ground, and premises next the river, the warehouse and the casements and appurtenances thereto belonging. The jury tell us that it was as appurtenant that the exclusive

clusive right to the use of the land in question, over which the barges were moored, passed to the lessee.

As it is an acknowledged rule, that land cannot be appurtenant to land, it follows that the jury drew a right inference from the deed when they found that the land itself between high and low water mark was *not* demised; and when they say that the *exclusive use* of the land was demised for the accommodation of the tenants of the wharf, they do not mean *exclusive* use in the sense which those words import, when they are held to pass the land itself. That would be contrary both to their own express finding, and to the manifest construction of the deed itself, set out upon the record. It may be assumed as a fact, therefore, that the land over which the barges were moored, was not demised, though the land to which they were attached was demised. The question then comes to be, whether by law a distress can be made upon property situated upon land which is not parcel of the demise — land of which the tenant has at most an easement.

It cannot be denied that the law is generally understood to be as laid down by the Lord Chief Baron *Comyns* in his *Digest*, title *Distress*, A 3.; that, for rent reserved upon a lease, a man may distrain upon any part of the land out of which the rent issues: evidently implying a negative: that he can distrain no where else.

It would surely be vain to contend that the rent issed out of the soil of this navigable river. Much ancient learning has been ingeniously brought into action upon this occasion, to prove that a distress may be taken upon an easement or a right analogous to what the tenants are supposed to have had upon the river in this case. But none of the cases cited, when examined, warrant the proposition.

The total absence of all clear and direct authority upon such a point, is, I think, decisive against it. I do

1829.

CAPEL v. BUSZARD.

not think it necessary to examine the dicta and cases which have been mentioned, in order to shew that they fail in establishing the proposition for which they have been cited.

The exceptions to the rule that the distress must be upon the land, whether they are found in the common law, or introduced by statute, all prove the rule.

The right of the lord to follow when the cattle are removed *within his sight*, when it is stated by my Lord *Coke* in the 1st *Inst.* 161. is put upon this, that in judgment of law they are at the time within his fee.

The statute of *Anne*, affording a remedy where the goods are carried off clandestinely; the stat. of *G.* 2. authorising the landlord to distrain cattle feeding upon common, appurtenant to the land demised; all these exceptions prove the rule that the distress must be made upon land out of which the right of the landlord issues.

There is no reason in justice for extending by subtilty the right of distraining beyond what the ancient law of the realm has established. If the law were as contended by the Defendants below, the barges of a stranger moored there for a temporary purpose with their cargoes, might be seized; which would be unjust.

It has been said that a decision, that the right for distraining does not exist upon property situated as these barges were, would be dangerous to the commercial interests of the country. I am not able to discover the danger. The landlord will have his remedy by distress upon the premises really demised, and will have besides his remedy upon the contract.

If it be supposed that because the soil of the river cannot be demised by the owner of the adjoining wharf, the easement or privilege of attaching their barges to the adjoining wharf would be in danger, I must say I cannot discover the consequence. If this be an ease-

ment,

ment, as they say it is, to the benefit of which they are entitled, the law has the means of protecting men in their easements appurtenant to their lands as well as in the lands themselves. We are of opinion that the judgment should be affirmed.

1829.

CAPEL v. BUSZARD.

I am desired to state, that the late Chief Justice of the Common Pleas, who heard this case argued, does not concur in the opinion I have delivered, but thinks that the judgment ought to be reversed; the majority, however, of the Judges are of opinion, that it ought to be affirmed, and let it be affirmed accordingly.

Judgment affirmed.

WALSH, Bart., and Another, Executors of Sir H. STRACHEY, *v.* FUSSELL.

July 8.

A covenant with a lessor of premises in a parish, to indemnify the parish against any paupers which the covenanter may cause to be settled in it, is valid.

THE Plaintiffs declared in covenant, as executors of Sir *Henry Strachey*, upon an indenture of demise, bearing date the 12th *March* 1792, and made between the said Sir *Henry* of the one part, and the said Defendant on the other part, by which certain premises in the parish of *Elm* (of which it was alleged that Sir *Henry* was seised in fee), were demised to the Defendant for a term not yet expired; and the said indenture contained a covenant by the Defendant for himself, his executors, administrators, and assigns, that he did in and by the said indenture covenant, promise, and grant to and with the said Sir *Henry*, his heirs, and assigns, amongst other things, that he the said Defendant, his executors, administrators or assigns, should and would from time to time, and at all times thereafter, fully and clearly indemnify and save harmless the churchwardens and over-

1829.

WALSH v. FUSSELL.

seers of the poor of the parish of *Elm* for the time being, and all and singular other owners and occupiers of lands and tenements, and the inhabitants of or within the parish of *Elm* for the time being, of and from all manner of costs, rates, taxes, assessments, and charges whatsoever, for or by reason or means of the said Defendant, his executors, administrators, or assigns taking an apprentice or servant who should thereby gain a settlement within or become chargeable to the parish of *Elm* aforesaid; and then assigned, as a breach, that the Defendant would not indemnify and save harmless the churchwardens and overseers of the poor of the parish of *Elm* from all costs, by reason of his taking an apprentice or servant who should thereby gain a settlement, but, on the contrary thereof, he, the said Defendant, after the making of the said indenture, and after the death of the said Sir *Henry*, and during the continuance of the said term, to wit, on the 1st day of *December* in the year of our Lord 1826, took a certain servant, to wit, one *William Lansdown*, within the true intent and meaning of the said indenture, and the said *William Lansdown*, by reason of his being such servant to the said Defendant, did gain a settlement within the parish of *Elm* aforesaid, and within the true intent and meaning of the said indenture, to wit, in the parish aforesaid, in the county aforesaid: and the said Plaintiffs further said, that the said *William Lansdown* having so gained such settlement as aforesaid, did afterwards, to wit, on the 14th day of *February*, in the year of our Lord 1827, by reason of the premises, become chargeable to the said parish, and the overseers of the poor of the parish aforesaid for the time being, by reason thereof, as such overseers as aforesaid, were theretofore, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, forced and obliged to, and did necessarily pay, lay out, and expend divers

divers large sums of money, amounting in the whole to a large sum, to wit, the sum of 100*l.* in and about the necessary support, maintenance, and sustaining the said *William Lansdown* and his family, to wit, at the parish aforesaid, in the county aforesaid.

The Defendant pleaded several pleas in bar, to which there was a demurrer and joinder; and the question which ultimately arose was, Whether the covenant were a valid covenant in law?

This case was argued twice; by *Wilde* Serjt. for the Plaintiffs, and *Stephen* Serjt. for the defendant. The argument arising upon a demurrer to the pleas, the counsel for the Plaintiff commenced and replied; but the case will be more intelligible here if it commence with the

Argument for the Defendant. The declaration is ill on two grounds. First, the action does not lie for the Plaintiffs as executors; secondly, the covenant on which they sue is void; as being unreasonable, in restraint of trade, and contrary to the policy of the poor laws.

1st, The testator of the Plaintiffs, Sir *Henry Strachey*, having been seised in fee, the action ought to have been brought by his heir or devisee, who would be the persons, if any, entitled to damages for a breach of a covenant affecting the value of the land. *The Mayor of Congleton* v. *Pattison* (*a*) may seem to be an authority the other way; but in that case the covenant did not run with the land. It should appear also, that the party suing on such a covenant was the occupier of the land; for no one else could be damnified, the occupier alone being the person liable to pay poor rates. But,

2dly, The covenant is void. It is unreasonable that a lessor should prescribe to a lessee the mode in which

(*a*) 10 *East*, 130.

1829.

WALSH v. FUSSELL.

he is to conduct his business, or the quarter from which he is to engage his workmen, and to impose on him a liability for a term of unlimited duration. It would be impossible to predict at what distance of time the Defendant might be called on in respect of such a covenant.

Such a stipulation is also illegal as being in restraint of trade. In *Colgate* v. *Bacheler* (*a*), and *Hartley* v. *Rice* (*b*), it is laid down that covenants which merely tend to restrain trade, or even to discourage it, cannot be supported in law. *Mitchel* v. *Reynolds* (*c*) has decided, that general restraints of trade are absolutely void, and even particular restraints, unless upon adequate consideration. If the consideration does not appear, or appears to be insufficient, the Court will presume that the restraint is unjustifiable. In the present instance the restraint is manifest, and no adequate consideration appears.

Then, the covenant is contrary to the policy of the poor laws. According to *Blackstone* (*d*), settlements were given to encourage application to trades; so that if the covenant had the effect of preventing the defendant from hiring workmen out of other districts, they might be precluded from bettering their condition: if he hired them, notwithstanding the covenant, the overseers having no longer any motive for economy, would encourage pauperism by a lavish allowance.

Argument for the Plaintiffs.

The action lies for the Plaintiffs, the executors of the lessor, because the covenant is personal and does not run with the land: *Spencer's case* (*e*), *Bally* v. *Wells* (*g*), *Gray* v. *Cuthbertsen* (*h*), *Canham* v. *Rust.* (*i*) Where

(*a*) *Cro. Eliz.* 872.
(*b*) 10 *East*, 22.
(*c*) 1 *P. Wms.* 181.
(*d*) 1 *Bl. Com.* 352.
(*e*) 5 *Rep.* 16 *a.*
(*g*) 3 *Wils.* 25.
(*h*) *Selw. N. P.* 498.
(*i*) 8 *Taunt.* 237.

a seisin

a seisin in fee is alleged, it is not necessary to shew occupation; *Bullard* v. *Harrison* (*a*); and though the occupier pay the rates, the lessor is damnified where their amount is increased, since they ultimately fall on the rent.

There is nothing unreasonable in the covenant, or in restraint of trade. It would have been easy for the Defendant to have engaged workmen in such a way as not to confer a settlement; and even if that were impossible, if any increased liability were incurred, the Defendant would doubtless obtain the premises at a lower amount of rent. So that if there were any partial restraint, there is an adequate consideration for it; which, even according to *Mitchel* v. *Reynolds*, and *Homer* v. *Ashford* (*b*), is a sufficient answer to any such objection. But the *Mayor of Congleton* v. *Pattison* has decided, that an engagement to bear the burthen occasioned by the introduction of a manufacturing business, is no restraint of trade.

With respect to the poor laws, a pauper has no privilege to claim a settlement in one place rather than another; being entitled to relief wherever he is settled, the locality of his settlement, is, so far, a matter of indifference; and with respect to the overseers, although a covenant to pay a net sum in discharge of a parish liability be illegal, a contract of indemnity has never been holden ill.

TINDAL C. J. The Plaintiffs declared in covenant as executors of Sir *Henry Strachey* upon an indenture of demise, bearing date the 12th *March* 1792, and made between the said Sir *Henry* of the one part, and the said Defendant of the other part, by which certain premises were demised to the Defendant for a term not yet

(*a*) 4 *M.* & *S.* 387. (*b*) 3 *Bing.* 322.

 expired;

1829.

WALSH v. FUSSELL.

expired; and the said indenture contained a covenant by the Defendant for himself, his executors, administrators, and assigns, that he did in and by the said indenture covenant, promise, and grant to and with the said Sir *Henry*, his heirs and assigns, amongst other things, that he the said Defendant, his executors, administrators, or assigns, should and would from time to time, and at all times thereafter, fully and clearly indemnify and save harmless the churchwardens and overseers of the poor of the parish of *Elm* for the time being, and all and singular other owners and occupiers of lands and tenements, and the inhabitants of or within the parish of *Elm* for the time being, of and from all manner of costs, rates, taxes, assessments, and charges whatsoever, for or by reason or means of the said Defendant, his executors, administrators, or assigns taking an apprentice or servant who should thereby gain a settlement within or become chargeable to the parish of *Elm* aforesaid; and then assigned as a breach, that the Defendant would not indemnify and save harmless the churchwardens and overseers of the poor of the parish of *Elm* from all costs by reason of his taking an apprentice or servant who should thereby gain a settlement, but on the contrary thereof, he, the said Defendant, after the making of the said indenture, and after the death of the said Sir *Henry*, and during the continuance of the said term, to wit, on the 1st day of *December*, in the year of our Lord 1826, took a certain servant, to wit, one *William Lansdown*, within the true intent and meaning of the said indenture, and the said *William Lansdown*, by reason of his being such servant to the said Defendant, did gain a settlement within the parish of *Elm* aforesaid, and within the true intent and meaning of the said indenture, to wit, in the parish aforesaid, in the county aforesaid, and having gained such a settlement became chargeable to the parish of *Elm*. The Defendant pleaded several pleas

1829.

WALSH v. FUSSELL.

pleas in bar, to which there was a demurrer and joinder; and the question which ultimately arose was, Whether the covenant was a valid covenant in law?

It was contended, on the part of the Defendant, first, hat the Plaintiffs had no interest which would authorize them to maintain an action; secondly, that the covenant was void; on the ground that it was unreasonable, that it was in restraint of trade, and that it was against the policy of the poor laws, inasmuch as it took away from the overseers any reason for economy, and was injurious to the poor themselves. But we do not think any of the objections maintainable; for, as to the first, the covenant being an express covenant with the lessor, and not being a covenant running with the land, an action lies for the breach thereof in the name of the personal representative of the covenantee, who becomes a trustee for the persons, whoever they may be, who are beneficially interested in the performance of the covenant. And as to the objections to the covenant itself, we do not think any of the consequences above stated flow so naturally and necessarily from the observance of this covenant as to call upon the Court to hold it to be void. It is not contended that the covenant is illegal on the ground of the breach of any direct rule of law, or the direct violation of any statute; and we think to hold it to be void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public. But such is not the case. There is nothing in the covenant which will prevent the poor generally from being employed by the Defendant; he may employ as a servant or an apprentice the poor of that parish, who may be sufficient for the service of the mill; he may employ in those capacities the poor who have settlements in other parishes, but who have certificates from those parishes;

or

1829.

WALSH v. FUSSELL.

or he may, in the case of servants, hire them for a smaller term than a year, and thereby prevent them altogether from gaining a settlement. There is, therefore, no general restraint of the poor from being employed in the service of the Defendant in this parish. And as to any abstract right in a pauper to obtain a settlement in any parish he chooses to select, as he must have a settlement some where, the law will not consider a settlement in one parish rather than another as any benefit to the poor. If the objections urged in this case had been entitled to weight, we think they would not have been omitted in the *Mayor of Congleton* v. *Pattison*; for although the question in that case was, whether the covenant ran with the land or not, this objection would at once have put an end to the action. And in a case of *Hill and Others* v. *Eastaff*, which was argued in *B. R.* in *Easter* term 1819, where an action of debt was brought upon a bond conditioned that the obligors, who were the churchwardens and overseers of one parish, should indemnify the obligees, who were the churchwardens and overseers of another parish, and all the inhabitants of that parish, from all costs, charges, and expenses which might be incurred by the latter parish, by reason of one *Stevenson* having put himself apprentice to one *Moor* in the latter parish, the Court gave judgment for the plaintiff; and some of the objections above raised would have applied as well to his case as to the one before us. Upon the whole, we think the judgment in this case should be given for the Plaintiffs.

Judgment for the Plaintiffs.

1829.

PARTINGTON *v.* WYATT.

June 27.

Where a rule for judgment as in case of a nonsuit, is discharged upon a peremptory undertaking, costs incurred at the sittings, in consequence of notice of trial, are not allowed, unless mentioned in the rule.

A RULE for judgment as in case of a nonsuit for not proceeding to trial in this cause, had been discharged on *Saturday*, *May* 30th, upon the Plaintiff's giving a peremptory undertaking to try at the next sittings. In the rule there was no mention of costs.

On the ensuing *Monday*, by consent, the rule was drawn up as follows: — "*Partington*, Gent. one, &c. v. *Wyatt*. Upon reading a rule made in this cause on *Friday*, 22d instant, and the affidavit of *William Partington*, the Plaintiff in this cause, and upon hearing counsel for both parties, It is ordered, that the said rule be and the same hereby is discharged, the Plaintiff by his counsel hereby undertaking peremptorily to proceed to the trial of this cause at the sittings after next *Trinity* term, to be holden at *Guildhall*, in and for the city of *London*. And it is further ordered, that the said Plaintiff do and shall pay to the said Defendant, or his attorney, costs, to be taxed by one of the prothonotaries of this Court, for the Plaintiff's not proceeding to the trial of this cause at the sittings after *Hilary* term, 1827, and also at the sittings after *Michaelmas* term last, pursuant to notice given, unless the said Plaintiff, after notice of this rule to be given to his attorney or agent, shall shew sufficient cause to the said prothonotary to the contrary at the time of such taxation."

The circumstances of the case were enquired into by the prothonotary, and upon a due hearing he refused to allow the Defendant the costs incurred by him and his witnesses during six days stay at the sittings, (at the end of

1829.

PARTINGTON v. WYATT.

of which time the Plaintiff withdrew his record,) or the costs of the briefs delivered at the sittings.

Upon an affidavit of these facts,

Taddy Serjt. obtained a rule *nisi* for the prothonotary to review his taxation, and allow the Defendant all the costs incurred by his attending the sittings.

Bompas Serjt. who shewed cause, relied on the circumstance that by the terms of the rule the costs were left in the discretion of the prothonotary, as he was only to allow them in case the Plaintiff did not shew a sufficient cause to the contrary: and as he had decided on a hearing, it must be presumed sufficient cause had been shewn. Further, he contended that costs incurred at the sittings could not be given upon a rule for judgment as in case of a nonsuit discharged upon a peremptory undertaking. Such costs could only be obtained on a rule for costs for not proceeding to trial pursuant to notice.

Taddy. The discretion of the prothonotary was to be exercised only as to the *quantum*, not as to the right to costs; and the Defendant is entitled to obtain the costs of the sittings on a rule for judgment as in case of a nonsuit; otherwise the parties must be put to the expense of two rules instead of one.

By the rule of *Trinity* term, 13 *G.* 2. 1739, "It is ordered by the Court, that from and after the last day of this term, where notice is given of the execution of a writ of enquiry and not countermanded in time, the defendant shall be entitled to costs from the plaintiff for not executing such writ of enquiry, *in the same manner as the defendant by the course of the Court is now entitled to costs from a plaintiff who does not proceed to the trial of an issue joined after notice given.*" And such

such costs were allowed in *Jones dem. Wyat* v. *Stephenson* (*a*), *Kelle* v. *Bromsale*. (*b*) Such also is the practice of the Court of King's Bench.

In *Impey's Common Pleas* it is stated, "It has been determined, and is now the practice of this Court, that if the defendant obtains a rule for costs for not going to trial, he shall not have a rule for judgment as in the case of a nonsuit: *Ogle* v. *Moffat*. (*c*) But if any subsequent laches is made, a judgment as in case of a nonsuit, may then be applied for; and as those costs are always allowed in the latter rule, there does not seem any necessity ever to move for the former one."

TINDAL C. J. When the rule of *Saturday*, *May* 30th, was moved for, nothing more passed than would authorize the drawing up the rule in the ordinary form, which is, that the rule be discharged on a peremptory undertaking to try. It appears that on the *Monday* following a special rule was drawn up by consent, in which the costs were left in the discretion of the prothonotary, who, upon hearing both parties, has refused to allow any: either way, therefore, the party is in the same state, and there is no ground for the interference of the Court.

PARK J. We are desired to insert in the rule words which are not there. The prothonotary did hear the parties according to the rule; and in his judgment a sufficient cause was assigned for not allowing the Defendant the costs in question. We cannot yield to this application.

BURROUGH J. concurred.

(*a*) *Barnes*, 316.
(*b*) *Id.* 230.
(*c*) *Barnes*, 133. 316.

GASELEE

1829.

PARTINGTON v. WYATT.

GASELEE J. This is in the usual form: and the prothonotary did hear and decide. Perhaps, for the future, it should be part of the rule that the costs of the sittings shall be borne by the Plaintiff upon enquiry by the prothonotary as to their amount.

Rule discharged.

July 6.

DOE dem. HAMMOND, PETTY, MULES, and WOODLEY *v.* COOKE and Another.

In favour of a Defendant in ejectment, who shewed no title to the premises sought to be recovered, the Court would not presume a surrender of a mortgage term to the owner of the inheritance, from the circumstance, that, in 1802, the Court of Chancery had decreed a sale of the mortgaged property for the payment of the money borrowed, and that some sales had taken place under the decree: But the Defendant had not purchased the land in question under the decree, and there was no evidence of any further proceedings in Chancery.

THIS was an action of ejectment brought upon several demises, against *Joseph Cooke* and *John Newton*.

At the trial, the jury found a verdict for Defendant *Newton*, and for the Plaintiff, against *Cooke*, as to so much of the premises as were in his possession; and, upon a motion being being made for leave to set aside the verdict and enter a nonsuit, on the ground that the legal estate was not in any of the lessors of the Plaintiff, but was in certain trustees under the will of Mr. *Middleditch*, named *Mangles* and *Taddy*, in whom no demise was laid, the facts were directed by the Court to be stated in a special case.

It appeared by that case, that the premises in question, amongst others, were conveyed by indentures of lease and release of *August* 1793, to the use of *Lubbock* and *Clarke*, for the term of 600 years, upon trust by mortgage or sale to raise the sum of 15,000*l*., or so much thereof as Mr. *Middleditch* should by deed or will direct, and subject thereto, to certain uses therein mentioned, with the ultimate remainder in fee to the use of Mr.

Middle-

1829.

DOE dem. HAMMOND v. COOKE.

Middleditch and his heirs; the deed of release containing a clause of cesser of the said term of 600 years, after full payment of the monies raised under it, and of the costs and expenses of the trustees. And it appeared further, that by a deed of assignment of the 25th *March* 1794, *Lubbock* and *Clarke* the trustees, by the direction of *Middleditch* who was a party to the same, assigned the premises in question, amongst others, to *Charles Hammond*, to hold for the said term of 600 years, subject to a proviso for redemption on payment of the sum of 6000*l.* and interest.

It was further proved that Mr. *Middleditch*, by his will, dated in *November* 1798, devised all his real estates to *Mangles* and *Taddy*, and their heirs, upon trust, to sell so much thereof as was necessary to pay all monies due upon mortgage of any part of his estate, and all his debts and legacies, and as to the residue, in trust, for the separate use of his wife, her heirs and assigns; and that he died in the year 1799.

One of the demises was laid in the names of *Petty*, *Mules*, and *Woodley*, the trustees named in the will of Mrs. *Middleditch*, afterwards Mrs. *M'Kenzie*; and one other demise was laid in the name of *Elton Hammond*, who was the personal representative of *Charles Hammond* the mortgagee.

The Defendant, *Cooke*, proved, that in 1799, a suit was instituted in the Court of Chancery for carrying the will of Mr. *Middleditch* into effect; in which suit, amongst other persons, *Charles Hammond* the mortgagee was a party, and that by certain decretal orders made in 1801 and 1802, it was ordered (amongst other things), that monies should be raised by sale or mortgage of the estate, and that what was found due on the mortgage should be paid to the mortgagee, and all further directions and costs were reserved until after sale of the estates.

No

1829.

DOE dem. HAMMOND v. COOKE.

No evidence was given as to any further proceedings in the Chancery suit, nor was any evidence given by *Cooke* of any title to the premises sought to be recovered, though it was proved that some sales took place under the decree, and that he, *Cooke*, had bought certain lots, not appearing, however, to form any part of the premises in question.

Wilde Serjt. for the lessors of the Plaintiff. On the part of the Defendant, *Cooke*, the Court is called on to presume that the mortgage money advanced by *Hammond* in *March* 1794 has been paid off, and that the term assigned to him to secure it, has either ceased under the proviso of cesser, or has been surrendered to the owners of the inheritance, so as to be merged in the fee now vested in *Mangles* and *Taddy*, the trustees under Mr. *Middleditch*'s will. In order, however, to raise the presumption of the surrender or cesser of the term, the Defendant ought, at least, to have shewn the payment of the money; for it was not for the lessors of the Plaintiff to prove the negative, and shew that the money had not been paid. But proof of payment would not have been sufficient. The Defendant is not owner of the inheritance, nor does he claim under him: and an outstanding term always enures to the benefit of the owner of the inheritance, or those who claim under him; *Cholmondeley* v. *Clinton* (*a*); in favour of whom the courts have sometimes directed juries to presume a surrender of a term; never against them. In *Doe* v. *Wrighte* (*b*), the contest was between parties, both of whom claimed as heirs at law; and in *Doe* v. *Hilder* (*c*), between a tenant by *elegit*, and another creditor to whom a mortgage had been made by way of unfair preference. Lord *Eldon* and *Richards* C. B. disapproved of the ruling in that case, (*Aspinall* v. *Thompson*),

(*a*) *Sugd. V. & P.* 425. (*b*) 2 *B. & A.* 710. (*c*) 2 *B. & A.* 782.

1829.

DOE dem. HAMMOND v. COOKE.

son (a), and the Defendant afterwards recovered by shewing there had been no surrender. In all the other cases the presumption has been in favour of the owner of the inheritance, and never against him; *Goodtitle* v. *Jones* (b), *Doe* v. *Sybourn* (c), *Roe* v. *Reade* (d), *Emery* v. *Grocock* (e), *Townsend* v. *Champernown* (g); unless where he has attempted to defeat his own acts, as in *Bartlett* v. *Downes*. (h)

At any rate, the Court will not make a partial presumption; if they presume that the mortgage to *Hammond* has been paid off, they will presume that all the other debts have been paid and all the trusts executed, in which case the estate would be in *Petty*, *Mules*, and *Woodley*, the trustees under the will of Mrs. *Middleditch*.

Merewether Serjt. *contrà*. There is enough in the present case to justify the presumption of a surrender of the term to the owners of the fee. No title is shewn in the lessors of the Plaintiff. They all claim ultimately under trustees, who took from *Middleditch* in trust to concur in the sales ordered in the suit in equity, to which *Hammond*, the mortgagee, was himself a party. In that suit, as long since as 1801, the property is dealt with as vested in *Mangles* and *Taddy*, which could not have been the case if the term of 600 years had not ceased. There is, therefore, ample ground for presuming that it had been surrendered; that the mortgage money had been paid; and that the Defendant purchased under the authority of the Court.

Wilde. If the proceedings in Chancery had ever terminated, it would have been easy for the Defendant to

(a) *Sugd. V. & P.* 445.
(b) 7 *T. R.* 47.
(c) 7 *T. R.* 2.
(d) 8 *T. R.* 118.
(e) 6 *Madd.* 54.
(g) 1 *Young & Jarv.* 538.
(h) 3 *B. & C.* 616.

1829.

DOE dem. HAMMOND v. COOKE.

have shewn that fact; and it would be extravagant to presume satisfaction from the mere existence of a Chancery suit.

Cur. adv. vult.

TINDAL C. J. (After stating the case, as *ante*); —

One of the demises was laid in the names of *Petty*, *Mules*, and *Woodley*, the trustees named in the will of Mrs. *Middleditch*, afterwards Mrs. *Mackenzie*, and one other demise was laid in the name of *Elton Hammond*, who was the personal representative of *Charles Hammond* the mortgagee.

It is obvious, therefore, that the objection taken by the Defendant *Cooke* cannot prevail, unless it can be shewn that the term of 600 years created in 1794 had either ceased under the proviso of cesser, or had been surrendered to the owners of the inheritance; for if the term is still outstanding, the Plaintiff may recover on the latter demise.

In order to lay the foundation for a presumption that the term had so merged, the Defendant *Cooke* proved, that in 1799 a suit was instituted in the Court of Chancery for carrying the will of Mr. *Middleditch* into effect, in which suit, amongst other persons, *Charles Hammond*, the mortgagee, was a party, and that by certain decretal orders made in 1801 and 1802, it was ordered, (amongst other things,) that monies should be raised by sale or mortgage of the estate, and that what was found due on the mortgage should be paid to the mortgagee; and all further directions and costs were reserved until after sale of the estates.

No evidence was given as to any further proceedings in the Chancery suit, nor was any evidence given by *Cooke* of any title to the premises sought to be recovered: though it was proved that some sales took place under the decree, and that he, *Cooke*, had bought certain

1829.

DOE dem. HAMMOND v. COOKE.

certain lots, not appearing, however, to form any part of the premises in question.

In this state of things the Court is called upon to say that the jury ought to have presumed that the mortgage money was paid off, and that the term had either ceased under the proviso, or had been surrendered to the owners of the inheritance, so as to be now merged in the legal estate vested in *Mangles* and *Taddy*, the trustees under Mr. *Middleditch*'s will.

The question is, Whether such presumption ought to be made? and we are all of opinion that, under the circumstances stated in this case, it ought not.

No case can be put in which any presumption has been made, except where a title has been shewn by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form.

In such case, where the possession is shewn to have been consistent with the existence of the fact directed to be presumed, and in such cases only, has it ever been allowed.

Thus, in *Lade* v. *Halford* (*a*), Lord *Mansfield* declared, that he and many of the Judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee or a satisfied term set up by a mortgagor against a mortgagee, but that they would direct the jury to presume it surrendered. So, in *England* v. *Slade* (*b*), where the lessor of the plaintiff claimed under a lease from *John Pym*, and it appeared that the estate had been devised by *John Pym*'s father to trustees, in trust to convey to *John Pym* on his coming of age, and in the mean time for his maintenance, it was held, that, though *John Pym* only came of age in 1788, and the trial took place in *March* 1791, the jury might presume a convey-

(*a*) *Bull. N. P.* 110. (*b*) 4 *T. R.* 682.

1829.

DOE dem. HAMMOND v. COOKE.

ance to *John Pym* from the trustees, which it was their duty to make, and what a court of equity would have compelled.

And where the same facts arose in the case of *Doe d. Bowerman* v. *Sybourn* (*a*), Lord *Kenyon* said, that in all cases where trustees ought to convey to the *beneficial owner*, he would leave it to the jury to presume, where such a presumption could reasonably be made, that they had conveyed accordingly, in order to prevent a just title from being defeated by a matter of form.

Again, in *Doe* v. *Hilder*, the surrender of a mortgage term was directed to be presumed in favour of a judgment-creditor, who had seized the land in question under an *elegit* taken out upon a judgment obtained against the owner of the inheritance.

And, lastly, in *Doe* v. *Wright* the presumption was in favour of the person who was proved to be heir at law, against the Defendant claiming, but failing in proving himself to be the heir.

In all these cases the presumption has been made in favour of the party who has proved a right to the beneficial ownership; the possession has been consistent with the existence of the surrender required to be presumed, and has made it not unreasonable to believe that the surrender should have been made in fact; and the presumption has been made accordingly, in order to prevent justice from being defeated by a mere formal objection.

But here we are called upon to declare the presumption ought to have been made in favour of a person who has proved no right to the possession, no title, no conveyance; a person who stands upon the mere naked possession, without any evidence how or when he acquired it. And what is stronger against the Defendant, he lays before the jury only a partial statement of the

(*a*) 7 *T. R.* 2.

ground

1829.

DOE dem. HAMMOND v. COOKE.

ground of presumption, for he proves only the commencement of the proceedings in equity, without shewing their termination.

Under these circumstances, the Court think the Defendant has not placed himself in a condition to call for any presumption in his favour, inasmuch as, for any thing that appears to the contrary, the presumption which is asked for would rather tend to defeat than to promote the ends of justice. We, therefore, think the verdict should remain for the Plaintiffs.

Postea to the Plaintiffs.

HALL and Others *v.* CECIL and JOHN REX.

June 23.

ASSUMPSIT by a schoolmistress for instructing the Defendants' sisters.

One who admits he is liable in respect of a claim on which an action is brought, is nevertheless incompetent to be a witness in the action; for though contribution in respect of the claim advanced be ultimately against his interest, he has a stronger immediate interest to defeat the action or lessen the damages.

At the trial before *Park* J., *Middlesex* sittings after *Easter* term, the Plaintiffs put in a bill of exchange, to which *Cecil* and *John Rex* were parties, and gave some other evidence of their undertaking.

The Defendants proposed to call as a witness their brother *George Rex*, who admitted himself to be a co-contractor, but *Park* J. rejected him as an interested witness.

A verdict having been given for the Plaintiffs,

Andrews Serjt. obtained a rule *nisi* for a new trial, upon the ground, among others, that the testimony of *George Rex* ought to have been admitted, as adverse to his own interest.

Wilde Serjt. shewed cause. Although it might ultimately be against the interest of the witness to admit that he was responsible for his sister's instruction, yet, as

1829.

HALL v. REX.

he would be liable to his brothers for contribution for costs, he had an immediate interest in defeating this action, or lessening the damages; and so certain and immediate an interest ought, in the estimation of his competency, to preponderate against a contingent or remote liability. In *Jones* v. *Brooke* (*a*), in an action by an indorsee against the acceptor of a bill, which had been accepted for the accommodation of the drawer, the drawer was holden not to be a competent witness for the defendant to prove that the holder took the bill for a usurious consideration. And in *Goodacre* v. *Breame* (*b*), in an action of *assumpsit* for goods sold and delivered, the plaintiff having proved the sale of the goods to the defendant and *J. S.*, who were partners in trade, Lord *Kenyon* held that *J. S.* could not be a witness for the defendant to prove that the goods were sold to himself; for by discharging the defendant he benefited himself, as he would be liable to contribute to the plaintiff's costs.

Andrews. Between the two conflicting interests the witness stood indifferent.

TINDAL C. J. Assuming that *George Rex* was a co-contractor, he would have been liable to his brothers for contribution to the costs and damages occasioned by this action; he therefore had clearly an interest to defeat the action or reduce the damages, and was properly rejected.

PARK J. and BURROUGH J. concurred.

GASELEE J. The cases have decided that liability to contribute to the costs is sufficient to render the witness incompetent.

Rule discharged.

(*a*) 4 *Taunt.* 464. (*b*) *Peake, N. P. C.* 175.

1829.

WILLANS *v.* TAYLOR.

July 2.

CASE for a malicious prosecution. *Willans* had sued *Taylor*, and had recovered a verdict against him, in an action for treble the amount of money lost at play.

Upon the trial of this action *Willans* had deposed, among other things, that he had lost money seventeen times, and that he had played at *Taylor*'s on *Good Friday*.

Taylor then presented to the grand jury at the *Westminster* sessions two bills for perjury against *Willans*, but did not himself appear before the grand jury, and both the bills were ignored.

He then went to the King's Bench, and having himself appeared before the grand jury, a bill was found in which the chief assignments of perjury were, that *Willans* had not lost money seventeen times, and that there had been no play on *Good Friday*. *Willans*'s bail was refused, and he was otherwise harassed.

This indictment was by various means kept suspended for three years, when *Willans* himself took the record down to trial. *Taylor* was present in court, and was called, but did not appear as a witness, and the jury, after a short pause, acquitted *Willans*.

Willans then commenced against *Taylor* this action on the case for a malicious prosecution; and at the trial before Lord *Wynford*, *Middlesex* sittings after *Easter* term, the facts above stated were proved on his part.

In an action on the case for a malicious prosecution, the Plaintiff is to give *primâ facie* evidence of want of probable cause, which the Defendant may rebut, if he can, by shewing the existence of probable cause.

Defendant presented two bills for perjury against the Plaintiff, but did not appear himself before the grand jury, and the bills were ignored.

He presented a third, and on his own testimony the bill was found. This prosecution he kept suspended for three years, till Plaintiff, taking the record down to trial, and Defendant declining to appear as a witness, although in court, and called on, Plaintiff was acquitted:

Held, sufficient *primâ facie* evidence of want of probable cause.

1829.

WILLANS v. TAYLOR.

Taylor called witnesses to shew that his house was shut up on *Good Friday*, and that *Willans* had not lost money seventeen times.

Willans, among other witnesses, had called Mr. *Gurney*, the short-hand writer, to prove that *Taylor* was present at the trial of the indictment for perjury; but as Mr. *Gurney* could not speak to that fact, he was not examined on the part of *Willans*. The counsel for *Taylor*, however, cross-examined him at great length, and caused him to read his notes of what passed at that trial. The learned Chief Justice said this evidence should go for nothing; but he thought there was not sufficient evidence to shew that *Taylor* had acted without probable cause, and directed a nonsuit.

Cross Serjt. obtained a rule *nisi* for a new trial, on the ground that the absence of probable cause in the prosecution of perjury was a mixed question of law and fact, in which it ought to have been left to the jury at least to find the fact; and also on the ground that Mr. *Gurney* had been allowed to depose to the testimony of witnesses who ought themselves to have been called.

Taddy and *Wilde* Serjts. shewed cause. In order to sustain an action like the present, it must be shewn that the Defendant proceeded with malice, and without probable cause. And it lies on the Plaintiff to shew that the Defendant proceeded without probable cause, not for the Defendant to shew that he had probable cause. *Sutton* v. *Johnstone* (*a*), *Arbuckle* v. *Taylor*. (*b*)

Neither can want of probable cause be implied from evidence of the most express malice. In *Incledon* v. *Berry* (*c*) the plaintiff gave in evidence expressions of the defendant indicative of express malice, and there

(*a*) 1 *T.R.* 493. 545. (*b*) 3 *Dow's Parl. Rep.* 160. (*c*) 1 *Campb.* 203. n.

closed

1829.

WILLANS v. TAYLOR.

closed his case; and *Le Blanc* J. ruled that some evidence (though under the circumstances slight evidence would be sufficient) must be given on the part of the plaintiff of want of probable cause, before the defendants could be called on for their defence. In *Wallis* v. *Alpine* (*a*) it was holden that the circumstance of the defendant's not having appeared as a witness on the prosecution of the plaintiff, and his consequent acquittal, was not sufficient to shew an absence of probable cause; and in *Purcell* v. *M'Namara* (*b*) the same circumstances were esteemed insufficient to establish malice. In the present case there is no evidence to shew an absence of probable cause for the prosecution instituted by the Defendant. The mere acquittal of the Plaintiff can have no such effect, since there may often be great reason for prosecuting, although conviction be a matter of uncertainty; and the circumstance that the jury hesitated shews that they at least thought there was some ground for prosecution.

Cross. Taking the law to be as stated, here is abundant evidence of want of probable cause; and the case should have gone to the jury. It would have been sufficient if some only of the charges were malicious, and without probable cause. *Reed* v. *Taylor* (*c*), *Farmer* v. *Darling*. (*d*)

The circumstance that two bills were ignored when the Defendant did not appear; that a bill was afterwards found on his testimony; that he declined to appear, though called, and that in the absence of his testimony the jury acquitted, are sufficient to shew that no one could make any charge against the Plaintiff but himself, and that he had no charge to make which he dared to

(*a*) 1 *Campb.* 204. n.
(*b*) 9 *East*, 361.
(*c*) 4 *Taunt.* 616.
(*d*) 4 *Burr.* 1971.

support

1829.

WILLANS v. TAYLOR.

support in open court. Even the evidence that *Taylor's* house was closed on *Good Friday* was compatible with the statement of money having been lost on that day, as the playing was probably continued from the *Thursday* night.

Andrews Serjt., on the same side, was stopped by the Court.

TINDAL C. J. The rule must be made absolute. This is an action for indicting the Plaintiff without probable cause. It is true, as admitted on both sides, that, in order to support such an action, there must be a concurrence of malice in the defendant and want of probable cause. Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accuser from liability to an action; for he may have had good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible where malice is combined with want of probable cause. What shall amount to such a combination of malice and want of probable cause is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused.

One question has been debated on the present occasion, — Who is to decide what shall be esteemed probable cause? That is a question of law for the judge, as it arises from the facts disclosed; and if there be any discrepancy in the testimony, or imputations

putations on the credit of the witnesses, those are matters for the decision of the jury; so that, as in questions touching reasonable notice and the like, the judge must pronounce his opinion on the facts when found by the jury.

The other question which has been discussed is, Who is to shew the absence of probable cause?

The plaintiff must take the first step; because it is not to be presumed that any one has acted illegally. There must, therefore, be *some* evidence of want of probable cause before the defendant can be called on to justify his conduct.

Then, was there evidence in the present case sufficient to call on the Defendant to prove affirmatively that he had probable cause for prosecuting the Plaintiff?

I am of opinion there was.

The first bills against the Plaintiff at the *Middlesex* sessions were thrown out when the Defendant did not appear before the grand jury. Another was afterwards preferred; the Defendant went before the grand jury, and the bill was found. He must, therefore, have thought himself an important witness for the crown. And where the facts lie in the knowledge of the Defendant himself, he must shew a probable cause. But when the trial came on, although he was in court, he absented himself just when he ought to have delivered his testimony, and the Plaintiff was immediately acquitted. The main facts in question must have been known to the Defendant: the Plaintiff had originally sworn that he had lost money to the Defendant on certain days. The Defendant, however, did not choose to submit to examination, but left the court at the moment he was about to be called. We must infer, therefore, that he had some knowledge which he did not choose to disclose; and his conduct on the occasion is sufficient *primâ facie* evidence of want of probable cause

1829.

WILLIAMS v. TAYLOR.

cause to throw it on him to prove affirmatively in the present case that he *had* probable cause.

The short-hand writer's evidence of what the witnesses said on the former occasion was not admissible. Testimony was received in this cause not on oath in this cause, and the witnesses themselves might have been called. There must be a new trial.

PARK J. I am of the same opinion. A great deal of the difficulty of these cases has been removed by the decision of *Sutton* v. *Johnstone*. The true distinction was there laid down by Lord *Mansfield*, who says, "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable or not probable are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law." (*a*) From that case down to *Davis* v. *Russell* (*b*) the courts have always decided in the same way. It must, no doubt, be ascertained whether or not the jury believe the witnesses; but if they do, and the facts are found, the judge is to determine whether or not they amount to probable cause. Nor can there be much difficulty on the question, who is to offer the first proof. *Le Blanc* J. said, in *Purcell* v. *M'Namara*, "An action for a malicious prosecution cannot, from the very nature of it, be maintained without proof of malice, either express or implied; and malice may be implied from the want of probable cause; but that must be shewn by the plaintiff." And, according to all the judges, that is the law of the land. Lord *Ellenborough*, indeed, held in *Wallis* v. *Alpine*, that mere omission to proceed with a prosecution is not sufficient to establish want of probable cause. And Lord *Kenyon* ruled the same in

(*a*) 1 *T. R.* 545. (*b*) 5 *Bingh.* 354.

Sykes

Sykes v. *Dunbar*. (*a*) But slight evidence is sufficient to throw on the other side the *onus* of shewing that there was probable cause. And where, as in the present case, the facts lie in the knowledge of the defendant himself, *he* must show a probable cause. *Buller's Nisi Prius*, pp. 13, 14.

In the present case, are all the circumstances together sufficient to throw the burthen of proof on the Defendant?

He prefers bills against the Plaintiff, on which he does not appear as a witness, and they are thrown out. He prefers another on his own testimony, and it is found. He refuses the Plaintiff's bail; suspends the proceedings for three years; and then, at the trial, absents himself. Who could explain the testimony which induced the grand jury to find the last bill but himself? and yet he disappears, and the Plaintiff is acquitted.

The short-hand writer's notes ought not to have been read, although the learned Chief Justice admitted they would weigh nothing. This rule, therefore, must be made absolute.

BURROUGH J. What shall be deemed probable cause is in every case a question for the judge. But there is ground enough here for granting a new trial. The short-hand writer's notes ought not to have been read; and when one grand jury ignored bills against the Plaintiff in the absence of the Defendant, and another found a bill on his testimony, and the Plaintiff was ultimately acquitted on the Defendant's withdrawing himself from the court when he ought to have given his testimony, there was enough to call on him to shew he had probable cause for the prosecution.

(*a*) 13 *East*, 363., cited in *Purcell* v. *Macnamara*.

GASELEE

1829.

WILLANS v. TAYLOR.

GASELEE J. The chief question here is, whether there was such insufficient evidence of want of probable cause as to warrant the learned Chief Justice in directing a nonsuit. I think there was not. A first indictment against the Plaintiff had failed for want of the Defendant's evidence; a second had been found on his testimony. It must be inferred, therefore, that he was a material witness; and though abandoning a prosecution be not of itself proof of want of probable cause, yet where, as here, it is persisted in for three years, and then dropped in the very hour of trial, there is strong ground for supposing that the prosecutor had no justifiable reason for commencing. The main question here was not whether there had been play on *Good Friday*, but whether the Plaintiff had lost money sixteen times; on which subject probably the Defendant did not like to be examined. His withdrawing from the trial, and the studied delay in his proceeding, are sufficient to throw it on him to shew he had probable cause.

Rule absolute.

July 7.

MICHENSON *v.* BEGBIE and Others. (*a*)

The Plaintiff, by charter-party, agreed with *G.* to convey corn at 4*s.* 6*d.* a quarter. *G.* made a sub-charter with *S.*, who consigned corn to the Defendants under bills of lading, by which they were to pay 6*s.* a quarter freight, and gave them notice to retain 1*s.* 6*d.* a quarter for him:

The Plaintiff having sued for freight at 6*s.* a quarter: Held, he was entitled to recover only 4*s.* 6*d.*

ASSUMPSIT for freight.

The Plaintiff, as owner of the ship *William Peile*, had entered into a charter-party with *Sack* and *Bremers*, ship-brokers in *London*, as agents for *Gerlack*, at *Dantzic*, that the *William Peile* should proceed to

(*a*) Communicated by a gentleman at the bar.

Dantzic,

1829.

MICHENSON v. BEGBIE.

Dantzic, and there take in a cargo of wheat for *London* at 4*s.* 6*d.* a quarter.

When the ship arrived at *Dantzic*, *Gerlack* had no cargo ready; whereupon the captain went on 'Change, and bargained with one *Soermans* to take 709 quarters of wheat at 6*s.* a quarter. The captain signed bills of lading, by which this wheat was to be delivered to the Defendants or their assigns, "they paying freight for the said goods 6*s.* per quarter." There was no reference to the charter-party on these bills of lading.

It did not appear whether the captain had made this bargain as agent of the Plaintiff or of *Gerlack*, but a subcharter-party was entered into between *Gerlack* and *Soermans*. The precise time, however, at which this was executed was not proved.

The wheat having been delivered to the Defendants, the Plaintiff claimed freight from them according to the bills of lading, at 6*s.* a quarter, which the Defendants, ignorant of *Soerman*'s claim, at first promised to pay. Ultimately they paid at the rate of 4*s.* 6*d.* a quarter, and refused paying the other 1*s.* 6*d.* a quarter on the ground that it had been attached in their hands by *Soermans*, who had given them notice that the Plaintiff was only entitled to 4*s.* 6*d.* a quarter. The attachment, however, having been dissolved by the putting in of bail, the Plaintiff brought this action to recover freight at the rate of 6*s.* a quarter.

A verdict having been taken at the *London* sittings after *Easter* term for the whole amount, subject to a motion to set it aside and enter a nonsuit or verdict for the Defendants,

Wilde Serjt. obtained a rule *nisi* accordingly, on the ground that the Plaintiff could not recover more than he had stipulated for by charter-party with *Gerlack*.

Jones

1829.

MICHENSON v. BARRIE.

Jones Serjt. shewed cause. After commenting upon and contesting the sufficiency of the evidence to shew that the captain made the subcontract on the part of *Gerlack*, he argued, that, assuming the subcontract to have been duly proved, the bills of lading having been made out at one entire freight, and the Defendants having received the goods and promised to pay the freight, they could not set up the charter-party between the Plaintiff and *Gerlack*, to which they were not parties, as an excuse for not doing so. The Plaintiff proceeded on a new contract, the bills of lading, in which the Defendants were named, and which were binding on them if they accepted the cargo. In *Cock* v. *Taylor* (*a*), *Roberts* v. *Holt* (*b*), and *Leer* v. *Yates* (*c*), it was holden that the receipt of a cargo implied a promise to pay freight. In *Sodergren* v. *Flight* (*d*), and *Bell* v. *Kymer* (*e*), the same liability was holden to attach to the indorsee of a bill of lading; and the circumstance that the freight was agreed for by a subcontract in the present case, would not exonerate the Defendants. In *Ward* v. *Felton* (*g*), the defendant was not so much indorsee of the bill of lading, as agent to the consignee, and was known to be acting as agent by the master of the plaintiff's ship. *Artaza* v. *Smallpiece* (*h*), where Lord *Kenyon* said that the consignee of goods is liable to freight, and not the person to whom he sells them, was overruled by *Cock* v. *Taylor* and *Bell* v. *Kymer*. In *Moorsom* v. *Kymer* (*i*) there was no contract on the part of the defendant, the question being concluded by the peculiar terms of the charter-party. In *Pinder* v. *Wilks* (*k*), the defendants were neither consignees nor holders of the bill of lading. The defendants here, therefore, were liable to the plaintiff on

(*a*) 13 *East*, 399.
(*b*) 2 *Show.* 443.
(*c*) 3 *Taunt.* 387.
(*d*) 6 *East*, 621, 622.
(*e*) 3 *Campb.* 545.
(*g*) 1 *East*, 507.
(*h*) 1 *Esp.* 23.
(*i*) 2 *M.* & *S.* 303.
(*k*) 5 *Taunt.* 612.

the

1829.

MICHENSON v. BEGBIE.

the bills of lading, and could not enter into question as to his engagements with other persons. If *Soermans* or *Gerlack* had any right to the 1*s.* 6*d.* additional freight, it could only be on a claim between them and the Plaintiff: with him they must settle their differences; the Defendants could never incur any risk by paying the ship-owner his freight according to the bill of lading.

TINDAL C. J. I think this rule ought to be made absolute. It is clear the Plaintiff has obtained all he ever bargained for, that is, all he was to have under the charter-party; and he now seeks to recover what belongs to others under a more advantageous bargain, which has been sufficiently proved. All the cases cited are cases in which there was no second party intervening: here notice was given to the Defendants, by the parties entitled to the additional freight, not to pay it to the Plaintiff. The promise made by the Defendants, being made in ignorance of the rights of those who were really entitled, is not binding on them. The Plaintiff has received all that was due to him under his own contract, and he has no more right to the sum bargained for under the second contract, than a lessor would have to claim from an under-lessee a higher rent reserved by the lessee.

PARK J. I cannot comprehend the difficulty. Is there any thing to prevent a man who has chartered a ship from letting it to another at a higher rate? How is the Plaintiff injured, if paid at the rate he agreed for, by another person's obtaining a higher rate for the same voyage. The cases cited have no application to the circumstances of the present.

BURROUGH J. The only question has been, Whether one man is to recover another man's money?

Rule absolute.

1829.

July 8.

Earl of SHREWSBURY *v.* HAYCROFT.

Service of a writ directed to the chamberlain of *Chester* is irregular without his mandate to the sheriff.

THE writ in this case was directed to the chamberlain of the county palatine of *Chester*, and served by the Plaintiff's attorney on the Defendant.

Cross Serjt. obtained a rule *nisi* to set it aside, on the ground that the writ itself was improperly served; that on the receipt of the writ the chamberlain should have issued his mandate to the sheriff, and the mandate should have been served.

Jones Serjt., who shewed cause, contended that the Court would only set aside the service where there was likely to be confusion with regard to the filacer, *Williams* v. *Gregg* (*a*), which was not the case here; or where the writ was improperly addressed to an officer on the spot. But

The COURT held that the Plaintiff's attorney ought to have taken the intermediate step of procuring the chamberlain's mandate to the sheriff, and that without it the service was irregular.

Rule absolute.

(*a*) 7 *Taunt.* 233.

HENLEY *v.* Mayor and Burgesses of LYME REGIS. *July* 8.

WILDE Serjt. opposed one of the bail in error in this case, on the ground that he was a member of the corporation of *Lyme*, and therefore in effect one of the Defendants. But

A member of a corporation may be bail in error in an action brought against the corporation.

The COURT disallowed the objection, and the bail passed.

Ex parte JEFFERIES. *July* 8.

WILDE Serjt. had obtained a rule *nisi* for a writ of privilege to exempt Mr. *Jefferies*, the clerk of the treasury of this court, from serving the office of overseer of the parish of *St. Giles*.

The clerk of the treasury of the Court of Common Pleas is bound to a personal attendance on his duties, and therefore is not compelable to serve the office of overseer.

He alleged that the duties of the office of clerk of the treasury required his constant attendance, and that he had offered to serve the office of overseer by deputy.

Merewether Serjt., who shewed cause, contended that the office of overseer could not be performed by deputy; that the office of clerk of the treasury might; and that it did not require the officer's personal attendance. In *March*. p. 30., in the case of a clerk of the court, it was said there was no privilege except as to the office of churchwarden. The question was, Whether personal attendance was requisite in both the offices which the

1829.

Ex parte JEFFERIES.

party was called on to fill? — and it lay with the party called on to shew that he could not perform by deputy his office in court. In *Bishop* v. *Lloyd* (*a*) the writ was refused, because personal incompatibility was not shewn. The same principle was acted on in *Farrand*'s case (*b*), and *Rex* v. *Clarke*. (*c*)

Wilde. The personal attendance of the officer in the duties of this court cannot be dispensed with, and the court will take judicial notice of the duties of its own officer.

In *The Mayor of Norwich* v. *Berry* (*d*), an attorney of the Court of Common Pleas, who was also a member of the corporation of *Norwich*, was, on the ground of his supposed attendance in court, held exempted from serving an office in the corporation. The privilege is attached to the court, not to the individual.

Cur. adv. vult.

The COURT this day, after reading several extracts from the report (published in 1816) of the commissioners appointed by parliament to enquire into the duties and emoluments of officers in the various courts of justice in *Great Britain*, which shewed that the clerk of the treasury of the Court of Common Pleas was bound to attend personally in the discharge of his duties, made the rule for a writ of privilege absolute, on the ground that the duties of the office of overseer were incompatible with such personal attendance on the court.

Rule absolute.

(*a*) *Bunb.* 225.
(*b*) 2 *W. Bl.* 115.
(*c*) 1 *T. R.* 679.
(*d*) 4 *Burr.* 2109.

1829.

HAMMOND *v.* TEAGUE.

July 8.

IN *assumpsit* for money had and received, money lent, money paid, &c., *Russell* Serjt. had obtained a rule *nisi* to plead several matters; viz. first, the general issue; and, secondly, as follows: —

The Court will not allow a party to plead in *assumpsit* matter which may be given in evidence under the general issue, unless the plea be simple, and not likely to perplex the Plaintiff.

That before the said times in the said first, second, and third counts mentioned, to wit, on the day and year aforesaid, to wit, at *London* aforesaid, the said Plaintiff and divers other persons had entered into and become and then were shareholders and partners together in a certain partnership or company, called the *Cornwall* and *Devonshire* Mining Company, and remained and continued such partners for a long space of time, to wit, from thence hitherto; that the said sums of money so alleged to have been lent and advanced, and paid, laid out, and expended by the said Plaintiff, and for the use of the said Defendant, and had and received by the said Defendant to and for the use of the said Plaintiff, were lent and advanced, and paid, laid out, and expended by the said Plaintiff, and had and received by the said Defendant and the said other partners in the said company or partnership for and towards the purposes and concerns of the said company and partnership, and the said sums then and there became and were part of the stock and effects of the said company or partnership, and became and were common to all the partners and shareholders therein, to wit, at, &c.

Wilde and *Merewether* Serjts. shewed cause. All that can be given in evidence under the second plea, may also be given

1829.

HAMMOND v. TEAGUE.

given in evidence under the general issue. The plea is a catching plea, very astute, and, as it does not narrow the question to be tried, but only tends to distract, and to give rise to a multifarious and double reply, the Court will refuse its sanction. *Farr* v. *Hinckling* (*a*), *Maggs* v. *Ames.* (*b*)

Russell. In *Moffatt* v. *Van Millingen* (*c*) the same plea was pleaded, (*Cur.* without the general issue). And in *Mainwaring* v. *Newman* (*d*), with the general issue. In *Holmes* v. *Higgins* (*e*) Lord *Tenterden* held, that it might be pleaded: and it would save expense, by confining the question between the parties to a single issue, for a single replication might be taken on the whole.

TINDAL C. J. By refusing the present application we do not abridge any portion of the defence, because all which it is proposed to plead may be given in evidence under the general issue. The Defendant alleges, that he seeks to avoid expense by driving the Plaintiff to a single issue; and though we incline to think that one issue might be taken on the whole matter which it is proposed to plead, the several allegations amounting to but one defence, — as in the case in *Burrow*, the levancy and couchancy of commonable cattle, — yet there is enough to perplex a Plaintiff, and to raise a doubt whether he could reply to all or a part only of the matter pleaded; and as the whole may be given in evidence under the general issue, the application must be refused.

PARK J. and BURROUGH J. concurred.

(*a*) 4 *B.* & *C.* 547.
(*b*) 4 *Bingh.* 470.
(*c*) 2 *B.* & *P.* 124.
(*d*) 2 *B.* & *P.* 120.
(*e*) 1 *B.* & *C.* 74.

GASELEE

1829.

HAMMOND v. TEAGUE.

GASELEE J. Under the statute of *Ann.* a party is permitted, with the leave of the Court, to plead as many several matters as are necessary for his defence. In *assumpsit*, the general issue, and matters which may be given in evidence under it, are not several matters; nevertheless, it has been the practice of the Court to permit a party to plead matters which might be given in evidence under the general issue, where such matters are simple and single. And such a course is beneficial, as it tends to prevent surprise. In the cases cited, the pleas were in short terms, partnership between the Plaintiff and Defendant; and if the plea now proposed had been such, perhaps we should have allowed it: but this plea contains five or six different matters, calculated to perplex the Plaintiff. The action is for money paid and money lent: the defendant pleads that the Plaintiff and Defendant and others were partners in a mining company; that the money was employed by them for the purposes of the company, and became part of the effects of the company. That is no longer money lent or money received; and, independently of the multifariousness of the plea, which would put the Plaintiff to difficulties, it is doubtful whether the plea is good. By refusing to allow it, we do not abridge any portion of the defence, and the rule must be

Discharged.

1829.

MEMORANDA.

In the course of the last vacation Sir *Nicholas Conyngham Tindal*, Knight, was appointed Chief Justice of this Court in the room of Sir *William Draper Best*, created Baron *Wynford*; and took his seat on the first day of this term.

Edward Burtenshaw Sugden, Esquire, was appointed his Majesty's Solicitor-General in the room of Sir *N. C. Tindal*; and was knighted.

Sir *Charles Wetherell*, his Majesty's Attorney-General, resigned his office, and was succeeded by Sir *James Scarlett*, Knight.

In the course of this term *William Henry Tinney*, *Thomas Pemberton*, *James Lewis Knight*, Esquires, and the Honourable *Charles Ewen Law*, were respectively appointed his Majesty's Counsel learned in the law; and took their seats within the bar accordingly.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term,

In the Tenth Year of the Reign of GEORGE IV.

1829.

NEWBURY *v.* ARMSTRONG.

Nov. 7.

ASSUMPSIT on the following guaranty: —

" To Mr. *John Newbury.*

" Sir, — I, the undersigned, do hereby agree to bind myself to be security to you for *J. Corcoran*, late in the employ of *J. Pearson* of *London Wall*, for whatever you may entrust him with while in your employ, to the amount of 50*l.*, in case of any default to make the same good.

" 11th *March* 1828. " W. ARMSTRONG."

" I agree to be security to you for *J. C.* late in the employ of *J. P.* for whatever you may entrust him with while in your employ, to the amount of 50*l.*:" Held, that the consideration for the guaranty sufficiently appeared.

A verdict having been given for the Plaintiff at the trial before *Tindal* C. J., *Middlesex* sittings after *Trinity* term, for 34*l.*, which *Corcoran* had failed to account for to Plaintiff,

1829.

NEWBURY v. ARMSTRONG.

Taddy Serjt. moved to set it aside and enter a nonsuit, on the ground that no consideration for the Defendant's undertaking appeared on the face of the agreement.

If *Corcoran* were already in the Plaintiff's employ at the time of the guaranty, there was an entire absence of consideration; and if he were taken in consequence of the guaranty, that could only appear by parol evidence, which it was the object of the statute of frauds to exclude in such a case. *Saunders* v. *Wakefield* (*a*), *Jenkins* v. *Reynolds* (*b*), *Lees* v. *Whitcomb.* (*c*)

TINDAL C. J. The statute of frauds requires that an agreement to answer for the default of another shall be in writing; and the word agreement has been held to include a consideration, for without one there is no valid agreement. The question here is, whether a consideration appears on this agreement, or is to be collected from it by fair and necessary implication? In my opinion the consideration appears. The language is, "To be security to you for *J. Corcoran*, late in the employ of *J. Pearson*, for whatever you may entrust him with while in your employ." That is, if you will entrust one who has left the service of another. The words are all prospective. It may fairly be implied that *Corcoran* had left one service, and that the guaranty was given in consideration of his being taken into another. We ought not to be too strict in the construction of these instruments; for if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life.

PARK J. I should be sorry to depart from the decisions in *Saunders* v. *Wakefield* and *Jenkins* v. *Reynolds*,

(*a*) 4 *B.* & *A.* 595. (*b*) 3 *Brod.* & *Bingh.* 14. (*c*) 5 *Bingh.* 34.

where

1829.

NEWBURY v. ARMSTRONG.

where the principle established in *Wain* v. *Warlters* (*a*) was unanimously adhered to. The question here is, whether the consideration sufficiently appears on this instrument? I think it does; because where the Defendant undertakes in respect of one who has *lately* been in the employ of another, for whatever the Plaintiff *may* entrust him with, the agreement is plainly prospective, and in consideration of the party's being employed and entrusted.

BURROUGH J. Whatever is necessarily implied may be taken to be in the instrument. There is no ground for the objection.

GASELEE J. It is clear that credit was to be given prospectively to *Corcoran*. That is a sufficient consideration.

Rule refused.

(*a*) 5 *East*, 10.

HERBERT, Assignee of KNIGHT, *v.* WILCOX.

Nov. 7.

A payment by an insolvent to a creditor within three months before the insolvent's imprisonment, is void under 7 *G.* 4. *c.* 57. *s.* 32., although the word *pay* is not employed in that section.

BY the 7 *G.* 4. *c.* 57. *s.* 32. it is enacted, "That if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer,

1829.

HERBERT v. WILCOX.

charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void, as against the provisional and other assignee or assignees of such prisoner appointed under this act: provided that no such conveyance, &c. shall be deemed fraudulent and void unless made within three months before the commencement of such imprisonment."

Knight being insolvent, borrowed money of *A. B.*, and immediately paid it over, within three months before his imprisonment, in discharge of the debts of various of his, the insolvent's, creditors, and among others, the Defendant.

The Plaintiff, as *Knight's* assignee, then sued the Defendant for money had and received, under the above section of the insolvent debtors' act.

A verdict having been given for the Plaintiff at the trial before *Tindal* C. J. last *Bristol* assizes,

Merewether Serjt. moved to set it aside and enter a nonsuit, on the ground that the above section of the act was directed against fraudulent transfers of property by the insolvent, but not against *bonâ fide* payments; that the word *deliver*, taken as accompanied with the other expressions, did not include a delivery by *payment* of money; and that by analogy to the language of the bankrupt acts, it might be presumed the word *pay* would have been employed if it had been intended to prohibit payment, even though voluntary.

TINDAL C. J. Looking at the clause, it is impossible not to see that payment is included; and there are equivalent and equipollent words. The language of the clause is, "That if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer,

fer, charge, deliver, or make over any estate real or personal, security for money, bond, bill, note, money, property, goods or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed, and is hereby declared to be fraudulent and void, as against the provisional or other assignee or assignees of such prisoner appointed under this act." What is intended to be made void is, not delivery in general, but delivery to a creditor. How can we understand delivery of money to a creditor except in payment, or for the advantage of such creditor? To say that a payment is not avoided under these circumstances would render the act nugatory.

PARK J. The intention of the legislature was to effect an equal distribution of the insolvent's effects, and terms could not have been found more explicit to prevent any thing that would defeat such distribution. The prohibition against delivering money to creditors comprehends payment.

BURROUGH J. concurred.

GASELEE J. The clear object of the act is that no insolvent shall pay any creditor within three months of his imprisonment, either in money or money's worth.

Rule refused.

1829.

Nov. 7. PINERO, One, &c. *v.* JUDSON and Another.

1. Agreement for a lease, with stipulation for the lessee to commence with laying out a considerable sum on the premises, (the lease to contain certain specified covenants,) "and in the mean time, and until such lease shall be executed, to pay rent, and to hold the same premises, subject to the covenants above mentioned:"

Held, to amount to an actual demise.

2. Use and occupation lies for constructive as well as actual occupation.

ASSUMPSIT for use and occupation of a house belonging to the Plaintiff for one quarter, from *Lady-day* to *Midsummer* 1828. At the last *London* sittings before *Tindal* C. J., the Plaintiff put in the following agreement: —

Memorandum of agreement made the day of 1823, between *Thomas Wing Pinero* of the one part, and *Charles Judson* and *Samuel Cook* of the other part. The said *T. W. Pinero*, for the considerations hereinafter mentioned, agrees to grant, seal, and execute unto the said *Charles Judson* and *Samuel Cook* a legal and effectual lease of all that messuage or tenement and premises, situate, standing, and being, &c. to hold the same, with the appurtenances, unto the said *Charles Judson* and *Samuel Cook*, their executors, administrators, and assigns, from the 25th of *March* now last past, for the term of five years, and three quarters of another year, wanting ten days, at and under the yearly rent of 80*l.* of lawful money of *Great Britain*, to be made payable quarterly, on the four most usual days of payment of rent in the year, without making any deductions or abatement out of the same, &c., and under and subject to covenants by and on the part of the said *Charles Judson* and *Samuel Cook*, their executors, administrators, and assigns, to pay the said rent in manner aforesaid, and also the sewers' rate and all other taxes, rates, assessments, and impositions whatsoever in respect of the said premises, parliamentary, parochial, and otherwise howsoever; to keep the premises in good repair, (damage by fire only excepted); to paint all the outside wood and iron-work of or belonging to the said premises

1829.

PINERO v. JUDSON.

mises twice over in good oil colours every third year of the said term; and at the end of the said term, to leave the said premises in good and tenantable repair, reasonable use and wear thereof, and damage by fire in the mean time, only excepted. That the said *T. W. Pinero* shall have liberty to enter and view the said premises, and to give or leave notice in writing thereon to repair all defects and decays within three months then next following; and that the said *Charles Judson* and *Samuel Cook*, their executors, administrators, and assigns, shall do all necessary repair in and about the premises (except damage by fire as aforesaid). And, further, that the said *Charles Judson* and *Samuel Cook*, their executors, administrators, and assigns, shall not convert the said premises into a shop, or use the same for carrying on therein any trade or business whatsoever. And also a proviso for re-entry on non-payment of rent or breach of any of the said covenants. The said lease also to contain a covenant by and on the part of the said *T. W. Pinero*, his executors, administrators, and assigns, for quiet enjoyment upon payment of the said rent and performance of the said covenants. And the said *Charles Judson* and *Samuel Cook* agree to accept and take the said lease of the said premises aforesaid upon the terms aforesaid, and to execute a counterpart thereof immediately upon the execution of the said lease, and to pay the expense of preparing the said lease. *And in the mean time, and until such lease shall be made and executed*, to pay unto the said *Thomas W. Pinero*, his executors, administrators, and assigns, the aforesaid yearly rent or sum of 80*l.* in manner aforesaid, and *to hold the same premises, subject to the covenants above mentioned.* And the said *Charles Judson* and *Samuel Cook* further agree to put the said premises into good and tenantable repair at their own expense, and to

1829.

PINERO v. JUDSON.

complete all such repairs on or before the 25th day of *April* now next ensuing. And, lastly, it is hereby mutually agreed between the said parties to this agreement, in case the said *Charles Judson* and *Samuel Cook* shall not put the said premises in such repair aforesaid within the time aforesaid, or if at any time before the said lease shall be made and executed any quarterly payments of the said yearly rent of 80*l.* shall be in arrears, and no sufficient distress be found on the said premises, then, and in either of such cases, the said *T. W. Pinero*, his executors, administrators, and assigns, shall and lawfully may re-enter upon the said premises, and thereupon this agreement shall be absolutely void to all intents and purposes, except only as to the recovery of the said rent so in arrear, or any satisfaction for the amount thereof. In witness, &c.

No lease was ever executed.

The Defendants proved a notice given by them in *September* 1827 of their intention to quit at *Lady-day* 1828, and that in fact they had quitted at the latter period. It was contended on their behalf, that the instrument relied on by the Plaintiff was only an agreement for a lease, and not an actual demise, and that the Defendants, as tenants from year to year, had determined their liability by quitting according to notice, at *Lady-day* 1828.

For the Plaintiff it was insisted, that the instrument amounted to an actual demise, and that the Defendants were liable under it till *Midsummer* 1828. Verdict for Plaintiff: which

Jones Serjt. now moved to set aside and enter a nonsuit instead, on the ground urged at the trial, and also on the ground that the Defendants not having been in actual occupation for the quarter in dispute, the form of action was wrong.

The Court must construe the instrument according to the

the intention of the parties, to be collected from it; *Doe* d. *Coore* v. *Clare* (*a*), *Tempest* v. *Rawlings* (*b*); and where there is a stipulation for a lease in future, it is manifest the parties cannot contemplate any present demise. Such was the inference drawn from the stipulation for a lease in *Goodtitle* v. *Way* (*c*); and such was the inference always drawn, till the case of *Poole* v. *Bentley* (*d*) was decided. That case, however, turned on the stamp laws, and is distinguishable from the present in the circumstance, that though there was a stipulation for a lease, there was also an actual demise *per verba de præsenti*, which is wanting here. If such words could be supplied, the applications which are frequently made to courts of equity for a lease pursuant to an agreement, would be unnecessary.

In *Roe* d. *Jackson* v. *Ashburner* (*e*) it was established, that the Courts will consider these instruments as agreements for demises, and not as actual demises, where such can be collected to have been the intention of the parties; and in *Morgan* v. *Bissell* (*g*) and *Dunk* v. *Hunter* (*h*), the circumstance that a future lease was stipulated for was deemed conclusive against the implication of any present demise.

But at all events, as the Defendants did not actually occupy, they should have been proceeded against in some other form of action. *Assumpsit* for use and occupation only lies where the party has actually occupied. And therefore, a husband has been holden not liable in this form of action in respect of premises occupied by his wife *dum sola*. *Richardson* v. *Hall*. (*d*) In *Naish* v. *Tatlock* (*e*) *Eyre* C. J. says, "The statute meant to

(*a*) 2 *T. R.* 739.
(*b*) 13 *East*, 18.
(*c*) 1 *T. R.* 735.
(*d*) 12 *East*, 168.
(*e*) 5 *T. R.* 163.
(*g*) 3 *Taunt.* 65.
(*b*) 5 *B. & A.* 322.
(*i*) 1 *Brod. & Bingh.* 50.
(*k*) 1 *H. Bl.* 323.

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1829.

PIERRO v. JUDSON.

provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy."

TINDAL C. J. This is an action in which the Plaintiff seeks to recover for the use and occupation of his premises for one quarter of a year ending at *Midsummer* 1828; and the question is, whether the Defendants' tenancy subsisted during that period. If the instrument on which the Plaintiff relies be a lease, it did: if that instrument be an agreement without any actual demise, it did not, a notice having been given by the Defendant to determine the holding at *Lady-day* 1828. Is this instrument, then, to be interpreted as a lease or an agreement for a lease? The law is well settled, that where there is any doubt as to the operation of the contract, the Court must endeavour to discover the intention of the parties from the contents of the instrument; and if we see a paramount intention that the instrument shall operate as a lease, we must hold it to be such, although it may contain conflicting expressions. We think this instrument must be taken to operate as a lease. It is true, the parties contemplate a formal lease in future, and if that were the only stipulation there might be some difficulty, although it is to be observed, that the term is to begin at once. But when we come to the latter words of the agreement, that until the lease is executed the parties are to stand in the same relation as if it had been executed, there is no longer any room for doubt. The Defendants are to hold according to covenants, some of which are inconsistent with a tenancy from year to year: as that, to paint once in three years; and that, for the-tenants putting the premises in repair before he commences his occupation. These covenants would be unreasonable for a tenant from year to year, but reasonable and usual for a tenant who takes a term.

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It was no doubt meant that there should be a formal lease, but that the tenant should hold in the mean time under a demise, upon the same terms as if that lease had been executed; and it is for his interest that the instrument should receive such a construction, because it is attended with greater certainty.

The disposing of the first objection puts an end to the second; for, according to the statute, if he holds or occupies, he may be sued in an action for use and occupation, and we find that he holds.

PARK J. We must look to the instrument to see what was the intention of the parties. Considering that the Plaintiff is an attorney, who, professionally, would wish to draw deeds, the object of the stipulation seems to have been to secure him a little employment in that way; for, till the deed was executed, the parties were to hold in the same way as under the deed. That part of the agreement removes any doubt, "And until such lease shall be made and executed, to pay to the said *T. W. Pinero*, his executors, administrators, and assigns, the aforesaid yearly rent, and to hold the same premises subject to the covenants above mentioned." The Defendants adopt all of them, and they are inconsistent with a holding from year to year, especially those for repairing before entering on possession, and for painting every three years. Our decision will be conformable with what was laid down by Lord *Ellenborough* in *Poole* v. *Bentley*, "that the intention of the parties, as declared by the words of the instrument, must govern the construction." And he there was led, from the covenant to lay out money, to draw an inference like that which we have drawn in the present case from the covenant to paint. The tenant was to do that in the first four years, which was inconsistent with a tenancy from year to year. There is nothing in the second point.

BURROUGH

1289.
PINERO v. JUDSON.

BURROUGH J. We should overturn *Poole* v. *Bentley*. which is good law, if we were to hold this not to be a demise. The other point is quite clear. This is such a holding as entitles the plaintiff to sue in an action for use and occupation. Actual occupation is not necessary; legal possession is sufficient; and the plaintiff had possession enough to sue in trespass.

GASELEE J. It is time that questions of this sort should be set at rest. The decisions are conflicting, but *Poole* v. *Bentley* rests on a sound principle. There is a material distinction between *Roe* v. *Ashburner* and *Poole* v. *Bentley*. *Ashhurst* J. says, in the former case, "I entirely agree to the position, that whether an agreement of this kind shall or shall not be considered as a lease, ought to depend on the intention of the parties, which must be collected from the words of the agreement, and from collateral circumstances. Where the words are *de præsenti*, 'I demise,' &c., or an agreement, that 'the party shall hold and enjoy,' and the party is immediately put into possession, the landlord shall not afterwards turn him out of possession, and say that it was not a present demise; for the permitting the party to enter, is strong evidence to shew that the landlord intended to give a present interest. But where the words themselves do not necessarily imply it, and where possession is not given, and there is no other act to manifest such intention, then it is merely an executory contract. Now, here the words themselves import an executory agreement; for the words 'shall enjoy' are followed by 'I engage to give him a lease,' and 'I will purchase land, &c., to be added to the rest,' &c. And the smallness of the quantity of land to be purchased and added to the rest cannot vary the case; because the whole depends, not on what was granted at the time but on what was to be granted afterwards. Besides, the

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rent is agreed upon at all events, and if this were construed to be a lease, the landlord would have a right to distrain for the whole rent, although the addition were not afterwards made by the purchase, and the only remedy left to the tenant would be by an action at law or a bill in equity." In *Poole* v. *Bentley*, there was nothing to be added on the part of the lessor subsequently to the agreement, as in *Roe* v. *Ashburner*. I think a court of equity would not, as the counsel for the defendant has contended, although there be an actual demise, not under seal, refuse to order a more formal conveyance. But the rule in *Poole* v. *Bentley* and *Barry* v. *Nugent* (*a*) ought to be followed here. As to the second point, parties have been repeatedly held liable in actions for use and occupation, although there has not been an actual occupation for the whole of the time in respect of which the actions have been brought.

Rule refused.

(*a*) 5 *T.R.* 165. *n.*

SAUNDERS *v.* MILLS.

Nov. 10.

LIBEL. At the trial before *Tindal* C. J., *Middlesex* sittings after *Trinity* term, the Defendant, the editor of a newspaper, admitted the publication of the matter complained of, which was as follows: — "*Extraordinary charge of poaching*. At the *Gloucester* assizes an action was brought by Lord *De Clifford* against Mr. *Saunders*,

1. A statement in a newspaper of the circumstances of a cause tried in a court of justice, given as from the mouth of counsel, instead of being accompanied or corrected by the evidence, is not such a report of the proceedings of a court of justice, as a newspaper is privileged to publish.

2. In mitigation of damages, the Defendant was allowed under the general issue to shew that he copied this statement from another newspaper, but was not allowed to shew that it had appeared concurrently in several other newspapers.

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1829.

SAUNDERS v. MILLS.

an attorney of *Bristol*, and two other persons, under these extraordinary circumstances, as stated by the counsel for the prosecution. The Defendant had taken a cottage on the border of Lord *De Clifford*'s preserves, where he kept a regular poaching establishment. Fair sporting was out of the question, for it appeared that the Defendant used to turn out his dogs in the night, when they did much mischief on the neighbouring estate. In consequence of this Lord *De Clifford* gave orders, that all dogs caught on his manors should be brought into the kennel, and there kept till they were claimed. It happened that a greyhound of the Defendant's was found in one of Lord *De Clifford*'s fields, and was taken to the kennel to wait its being claimed by the owner, as it was not certainly known to be a dog of the Defendant's. Instead of writing to Lord *De Clifford* to have the dog delivered up, the Defendant went with two other persons, on the 22d of *October*, and having broken open the door of Lord *De Clifford*'s dog-kennel, he rescued the dog. These parties came the next day to dig up the body of a dead dog. Mr. *Saunders* had a horse pistol, and then insulted Lord *De Clifford*'s servant; and Mr. *Saunders* challenged one of the keepers to fight. The actual injury to the kennel door was not much, but damages were sought to be recovered, which would teach the Defendant to behave more correctly for the future. The defence was, that the Defendant had done no more than was necessary for the recovery of his dog, and that another dog of his having been shot by one of Lord *De Clifford*'s keepers, and buried, they merely went on the second day to dig up the body of that dog, and bring it away. Mr. Justice *Park* said, that the amount of damages was not necessarily limited to the actual damage done to the door of the dog-kennel; but still he thought the jury should give just such damages as would not be very injurious to

to the Defendant's pocket, but yet such as might have the effect of making him mend his ways, and behave with more propriety in future. Verdict for the Plaintiff, damages 50*l*. Mr. Justice *Park*, — I shall certify for the special jury. If the Defendant dismisses his gamekeepers, he will soon pay up the damages."

He then proved that it was copied in substance from the *Observer* neswspaper, and proposed to give evidence that many other journals had published the same statement. This evidence the learned Chief Justice rejected.

The plaintiff in reply, put in a letter written by the Defendant to the Plaintiff, in answer to an application from the latter for an explanation of the first statement, which contained an explanation, but in language which (as it was contended on the part of the Plaintiff) conveyed a sneer also.

The jury gave a verdict for the Plaintiff, with 50*l*. damages.

Ludlow Serjt. moved for a new trial, on these grounds, 1st, The publication appearing on the face of it to be a report of a trial in a court of justice, was *primâ facie* a privileged publication, and the Plaintiff ought to have given *some* evidence of malice, instead of relying on the naked fact of publication. *Curry* v. *Walter* (*a*) has established the lawfulness of such reports; and in *R.* v. *Wright* (*b*), *Lawrence* J. said, "It has been said that the publication of the proceedings of courts of justice, when reflecting on the character of an individual, is a libel; to support which position, the case of *Waterfield* v. *The Bishop of Chichester*, has been cited; but on examining that case, it appears that the charge there was, that the Plaintiff had not published a true account: therefore I

(*a*) 1 *B. & P.* 53. (*b*) 8 *T. R.* 293.

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1829.

SAUNDERS v. MILLS.

do not think that case establishes the proposition, to support which it was cited; and I am not aware of any authority that does support it. The proceedings of courts of justice are daily published, some of which highly reflect on individuals; but I do not know that an information was ever granted against the publishers of them. Many of these proceedings contain no point of law, and are not published under the authority or sanction of the Court, but they are printed for the information of the public."

The courts of justice are open to all who are able to attend, and it can scarcely be unlawful for a man to read that which it would be lawful for him to hear. Reports of what passes in those Courts, afford the most instructive moral lessons to the people, and it would be inexpedient in any way to impede the circulation of them.

The result of all the decisions, as it may be collected from *Bromage* v. *Prosser* (*a*), is, that where matter published is on the face of it libellous without excuse, the Defendant must either shew its truth, or otherwise make out his own justification; but where it appears to be a privileged communication, or a publication of what has passed in a court of justice, the Plaintiff must shew its untruth, and the motive of the publisher.

The defendant here has cautiously qualified his statement, and divested it of its sting, by giving it only as the speech of counsel.

2dly, Evidence ought to have been admitted that the same statement was made in other journals, not by way of justification, but in mitigation of damages. In Lord *Leicester* v. *Walter* (*b*), the defendant was allowed to prove under the general issue, in mitigation of

(*a*) 4 *B.* & *C.* 247. (*b*) 2 *Campb.* 251.

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damages, that before and at the time of the publication of the libel, the Plaintiff was generally suspected to be guilty of the crime thereby imputed to him, and that on account of this suspicion, his character had not been lowered by the libel. So, in ——— v. *Moor* (*a*), in an action of slander, for imputing to plaintiff a specific charge of unnatural practices, the declaration containing the usual allegations of good fame, &c. the defendant was allowed upon cross-examination to ask the plaintiff's witness whether he had not heard in the neighbourhood reports that the plaintiff had been guilty of such practices. In *Wyatt* v. *Gore* (*b*), it was holden, that in an action on a libel, to which the general issue was pleaded, and there was no justification, the defendant might give in evidence, in mitigation of damages, not only that there were rumours and reports (of the same tenour as the libel) previously current, but that the substance of the libellous matters had been published in a newspaper.

3dly, The damages were, at all events, excessive, the Defendant having guarded his narrative, by giving it as the statement of counsel, and having reprinted it from another journal as part of the current news of the day.

TINDAL C. J. I am of opinion that the rule for a new trial ought not to be granted. The learned Serjeant has put his motion on three distinct grounds. The first is, that the plaintiff did not go far enough in his evidence, and ought to have proved that the publication was an incorrect report of what had occurred, or that the defendant had been influenced by express malice in making the publication; secondly, that evidence in mitigation of damages was improperly rejected; and, thirdly, that the damages were excessive. With respect

(*a*) 1 *M.* & *S.* 284. (*b*) 1 *Holt, N. P. C.* 299.

1829.

SAUNDERS v. MILLS.

to the first, that which I am about to say will not interfere with the generally received doctrine, that newspapers and other publications which narrate what passes in courts of justice are, to a certain extent, privileged. No one can read their accounts of judicial proceedings without being sensible, that, on several occasions, they do, to a great extent, serve the cause of public justice. They ought, therefore, to be privileged; but their privilege must be restrained to occasions in which they publish fairly what passes in the court. Now it is impossible to read the report in this cause without seeing that the publication is *ex parte*, and is not a fair and candid publication of what took place in the court at *Gloucester*. The report itself begins by professing to give an account of the action, as arising under "these circumstances, as stated by the counsel for the prosecution." It therefore does not even profess to be an account taken from the evidence given at the trial, nor even to be an account taken from counsel's statement but afterwards corrected by the evidence given in the cause. Every body knows that the statement of a counsel is *ex parte*, and that he is often instructed to make allegations which it is afterwards impossible to support in proof. Would it be either safe or proper, that after a cause has been tried, a statement, which the evidence has not at all supported, should be published in a newspaper; and then merely because that statement had been made by a counsel, it should be held to be privileged? Ought such a publication to be considered a fair report of what had passed in court, although the evidence afterwards given might not only not support, but might even to some extent contradict it? Ought such a publication to be privileged? I conceive not; and I think that such will not be held to be the law of the land. On the face of this report, it is not a fair account of the trial. It begins by saying that it

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1829.

SAUNDERS v. MILLS.

is a report of the statement of counsel, and it then goes on to say, that the defendant took a cottage in the neighbourhood of Lord *De Clifford*'s preserves, where he kept up a regular poaching establishment. No man can believe that this is the language of any witness — it can only be the language of counsel in aggravation of the case he is called on to support on the part of his client. The account says fair sporting was out of the question, for the defendant was in the habit of turning out his dogs at night, when, as it appeared, they did much mischief to the neighbouring estates. In that part of the report it evidently changes its character, and goes into the evidence, for it was only in the evidence that this circumstance could have "appeared." The Defendant has, besides, mixed up with the general allegations of the counsel for the then Plaintiff, a statement of the consequences; for he goes on to say, that in consequence of these things, Lord *De Clifford* ordered all the dogs found on his manor to be taken to his kennel and kept there till claimed. So far this report is of a statement made on the part of the Plaintiff at that trial. We come now to the report of the defence: and it would be thought, that if this pretended to be a fair report, the defence would be set out with at least the same degree of exactness and accuracy. This certainly would have been done in a fair account of the transaction. Instead of this, there is only a dry observation or two of counsel, and then comes the charge of the learned Judge; and in giving that, the Defendant has singled out more particularly that which bears unfavourably on the conduct of the present Plaintiff. I ask again, whether any one can say that this is a fair account of the proceeding? and that question I put to the jury, when I left it to them to say whether, on the face of this account, it was or was not fairly given? Without at all breaking in

1829.

SAUNDERS v. MILLS.

upon the supposed principle or right possessed by the editors of newspapers of communicating to the public the proceedings in courts of justice, I did not think, nor did the jury believe, that the account in this case was fairly given, or even imported to be so. This disposes of the first ground of the motion. The second is as to the rejection of the evidence of publication in other newspapers. It appeared to me, that as there was no justification or excuse upon the record, I had gone to the full length in allowing *The Observer*, from which the libel had been copied, to be put in evidence. That evidence might weigh with the jury, as shewing there was less of malice than if the Defendant had been the original composer of this libel, and so far he had the benefit of it; but I think I was justified in declining to receive evidence of a similar publication having been made in other newspapers. As to the question of damages, that is one which at all times it is the peculiar province of a jury to determine; and it is only when the damages are excessive and exorbitant to all common understandings that the courts feel themselves called on to interfere. Evidence was given of the apology which the Defendant offered to insert; and, probably, the jury might think that the nature of the apology was such as to add a degree of bitterness to the original libel. I see no reason, under all these circumstances, to object to the amount of the damages.

PARK J. I am of the same opinion. It has been admitted that the statement complained of imports a libel on the Plaintiff. It charges him with having kept a poaching establishment, in which fair sporting was out of the question, for that he used to turn out his dogs in the night, when they did much mischief on the neighbouring estates. But it has been contended that this was a report of what passed in a court of justice,

justice, and that such a report cannot be treated as a libel. All the cases, however, decide, that in order to exempt the publisher of such a report from the consequences attached to publishing a libel, it must be a fair report of what passed. In *Stile* v. *Nokes* (*a*), where the defendant published a highly-coloured account of judicial proceedings, mixed with the party's own observations and conclusions upon what passed in Court, which contained an insinuation that the plaintiff had committed perjury, Lord *Ellenborough* held that such a publication could not be justified; and said, "The account of the proceedings in Court is so interwoven with the comments, that we cannot with certainty separate them throughout, although we can see plainly enough that certain parts are an overcharged account of the judicial proceedings. The Court cannot decompose this mass: but the party who requires the separation to be made for his own defence, ought to have taken upon himself the burden of doing it, in order that the Court might see with certainty what parts he meant to justify. I should have great difficulty in saying what parts purport to contain an account of the trial, and what parts are libellous. If they cannot be separated by the industry of the pleader, how can they be so by general reference? If they can be so separated, they ought to have been." In the present case, it is very likely that the counsel said all that has been repeated by the present Defendant, and even that I might have adopted some of his expressions with regard to the conduct of the Plaintiff; but not one of the witnesses said that he kept a poaching establishment, nor was there any proof that such was the case. But I cannot accede to the position, that a party is excused for publishing every proceeding in a court of justice, even though he publish

(*a*) 7 *East*, 492.

1829.

SAUNDERS v. MILLS.

it fairly and with truth. In *R.* v. *Creevy* (*a*), a member of parliament who published in a newspaper the report of a speech delivered by him in the House of Commons, was held responsible for libellous matter contained in it, although the publication was a correct report of the speech, and was made in consequence of an incorrect publication having appeared in that and other papers. In *R.* v. *Mary Carlile* (*b*), the report of a trial which the defendant had published was true, but *Abbott* C. J. said, "There can be no doubt in the mind of the Court, or of any person acquainted with the law of the country, that if, in the course of a trial, it becomes necessary, for the purposes of justice, that matters of a defamatory nature should be publicly read, it does not, therefore, follow, that it is competent to any person, under the pretence of publishing that trial, to reutter that defamatory matter." And *Bayley* J. said, "We are bound, for the purposes of justice, to hear evidence in the course of judicial proceedings, the publication of which, at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of the morals and religion of the people. The first time I had occasion to consider the subject, was in the case of some trials for adultery. It very often happens, that, for the purposes of justice, our ears may be shocked with extremely offensive and indelicate evidence. But, though we are bound, in a court of justice, to hear it, other persons are not at liberty, afterwards, to circulate it, at the risk of those effects, which, in the minds of the young and unwary, such evidence may be calculated to produce."

The present, however, is manifestly not a fair report of what passed at the trial in question.

I think, also, that there is no ground for granting a

(*a*) 1 *M.* & *S.* 273. (*b*) 3 *B.* & *A.* 167.

rule

rule on account of the evidence which the learned Chief Justice rejected. Whether evidence as to the Plaintiff's general character ought to be admitted in an action for a libel, on the general issue, in mitigation of damages, has long been *vexata questio*. In *Jones* v. *Stevens* (*a*), there is a luminous exposition of the whole law on the subject by *Wood* B., and he strongly protests against the admission of such evidence. But what was rejected in the present cause was properly rejected, since, if admitted, it could not have operated as any extenuation of the Defendant's conduct.

BURROUGH J. This was a libel on the face of it, although professing to be a report of what passed in a court of justice, for the Defendant does not profess to state facts as deposed to by witnesses, but the mere opinion of the counsel who opened the cause.

As to the rejection of evidence of publications by others to the same effect, I have no idea that such a fact would have any weight at all. It is of no avail for the Defendant to say that others have done wrong as well as himself. The evidence was properly rejected.

GASELEE J. The only point on which I have entertained any doubt, is, Whether evidence ought to have been admitted that reports to the same effect were contained in other publications: but, beyond the report which *was* admitted, the Defendant was not shewn to have acted on any knowledge of such publications, and, therefore, I do not entertain sufficient doubt to desire any alteration in the judgment which has been pronounced by my Lord Chief Justice. Whether a Defendant, in a libel cause, may be permitted under the general issue to give evidence of matters of excuse, in

(*a*) 11 *Price*, 235.

1829.

SAUNDERS v. MILLS.

mitigation of damages, or is bound to plead such matters, seems still to be *vexata questio*; but the Defendant here has neither pleaded, nor offered to prove any thing that could operate as an excuse. In *Waithman* v. *Weaver and Others* (*a*), — which was an action brought by the Plaintiff against the Defendants, who were the proprietors and printers of the *John Bull* newspaper, for a libel attributing to the Plaintiff, amongst other things, the fact of having bought from a man of suspicious character two shawls, for a small sum of money, which he had himself sold to another person at a much higher price on the preceding day, — when the Plaintiff's case was closed, and the Defendant's counsel had addressed the jury, they proposed to call witnesses to prove that the libel in this respect was no more than a repetition of rumours which were prevalent at the time of the facts imputed to the Plaintiff therein, in order to diminish the damages, in case the jury should find a verdict for the Plaintiff on the general issue, by removing the impression of malicious invention in the account complained of, and quoted several authorities to shew that they were entitled to give such evidence; but *Abbott* C. J. objected to admit evidence of the existence of such injurious reports, said to be in circulation to the prejudice of the Plaintiff.

Rule refused.

(*a*) 11 *Price*, 257. in note.

1829.

HAYLLAR *v.* ELLIS.

Nov. 11.

Where a plaintiff makes several claims against a defendant, and the defendant makes others against the plaintiff, if an arbitrator, to whom the cause is referred, finds that the plaintiff had no cause of action, his award is, in that respect at least, sufficiently certain.

IN this cause an arbitrator had to decide on certain specific claims which the Plaintiff made against the Defendant, and the Defendant against the Plaintiff. He made an award in favour of the Defendant, and found generally that the Plaintiff "had no cause of action."

Taddy Serjt. moved to set aside the award, as not sufficiently certain. He contended it could not be pleaded in bar if the Plaintiff were again to sue the Defendant on any of the distinct causes of action submitted to the consideration of the arbitrator, as it would not with certainty appear which of them had been decided on. But

The Court held it sufficient, and

Taddy took nothing.

Tindal C. J. was absent at Chambers.

1829.

Nov. 11. MADDISON *v.* NUTTALL.

An ancient statement concerning the payment of the tithes of a parish by a modus, signed by the rector for the time being, is evidence against a succeeding rector as an admission by his predecessor, although found among the title deeds of a landowner in the parish, and not in the bishop's registry.

DEBT for tithes of hay, in the parish of *West Monckton*, *Somerset*. The Defendant pleaded an ancient *modus*, or customary payment, whereof the memory of man runneth not to the contrary, of 2*d.* for every acre of meadow land lying in the higher side of the parish, where it was averred the Defendant's land lay; and that it was meadow land. The Plaintiff traversed the existence of the *modus*.

At the trial before *Tindal* C. J., *Bridgwater* Summer assizes 1829, the Defendant offered in evidence, among other matters in support of the modus, the following document, which was found among the title-deeds of an extensive landowner in the parish: —

"A note of all such tenthes and tithes as have bene usuallye and accustomablye paied within the parishe of *West Monckton*, and countie aforesaid, and manner of the payment thereof tyme out of minde, and noe other, nor otherwise than as followeth; *videlicet*,

Imprimis, at *Ester*, before takinge of the communion, the communicants ought to come to the churche, and there with the parson are to make their *Ester* boocke, and are to shew him what groundes they lett or sett.

Item, for a garden vsed to be paied 1*d.*

Item, for each communicant paied 1*d.*

Item, in the higher side of the saied parishe payde for every tithable acre of meadow ij*d.*"

(There was a great variety of other items, some of which were alleged by the Plaintiff's counsel to be rank moduses, and the document concluded as follows: —)

"*Item*, the parson is to keepe a bull and a bore for the

1829.

MADDISON v. NUTTALL.

the parishe, or muste allowe them what they paye to other men for his defaulte in either kinde in y^t behalfe.

"The abouesayde tenth's tythes and no other, and manner of paymente as abousayde and not otherwise, have bene eu^r vsuallye payde, as it appeares by a certayne role bearing date the 22 daye of *August*, in the yere of our Lord God 1619, keept in the parish chest, subscribed vnto by fower seuerall men who were procters and gatherers of the tithes and tenthes as abouesaid at seuerall tymes for certaine yeres together, besides diusse other of the most able and sufficient men of the same parishe.

"*Ita est W. Kingelake.* (*Philipus ffry rect.*)

"*Philip Mathew*, als. procter,

"The marke of ⋈ *John Prince*,

William Rayer.

"*Humf. Quicke*,

"*Edm. Jane*,

"*Thomas Stevens.*

"*Henry H. Crosse*,

"*John Hare*,

"*Thomas T. L. Upham.*"

A terrier, signed by *Philip Fry*, but relating chiefly to the parsonage house and glebe, having been put in from the bishop's registry, in which terrier there was no mention of this modus for hay; it was objected that the document offered by the Defendant, purported to be a terrier, and ought not to be received, because it did not come from the proper custody; — the bishop's registry, or the parish-chest. But *Philip Fry* having been proved to have been rector of the parish from 1587 to 1642, and his handwriting having been also proved by a comparison with entries made by him in the parish-books, and with his signature to documents in the bishop's

1829.

MADDISON v. NUTTALL.

bishop's registry, the Chief Justice received the above document in evidence, not as a terrier, but as an admission made by the rector for the time being.

It appeared that the boundary between the higher and lower division of the parish was not very accurately known; had occasionally been varied by the removal of fences and otherwise; and that the field from which the Plaintiff claimed tithes in the present action, had once been ploughed, but was soon laid down to grass again. It was clearly, however, within the higher division, as alleged in the plea.

A verdict having been given for the Defendant,

Merewether Serjt. moved for a new trial, on the ground that the document found in the custody of the landowner ought not to have been received in evidence, even as the admission of a preceding rector, when there was a regular document of the same kind, the terrier from the bishop's registry, containing no mention of the modus; *Atkins* v. *Hatton* (*a*); that the document itself was not entitled to any credit, alleging as it did uncertain and rank moduses; and that no modus for a division of the parish could be certain, unless that division were accurately ascertained. He objected also, that a modus, being pleaded from time immemorial, could apply only to ancient meadow; that no evidence had been offered to shew that the land, the tithes of which were in question, was ancient meadow, and at all events, that it ceased to be such when it had been once ploughed. (*b*)

TINDAL C. J. The document objected to was evidence for the jury, *valeat quantum*. It was a very

(*a*) 3 *Gwill.* 1406. 2 *Anst.* 386.

(*b*) But see *Bishop* v. *Chichester*, *Gwill.* 1323. that a *parochial* modus may extend to lands inclosed within time of memory; *aliter* as to a *farm* modus.

ancient

ancient document, signed by the rector, and headed "Notification of the tithes of the parish." Though it did not come out of the proper repository for a terrier, it must have been evidence against the rector who signed it, during his incumbency; and if so, it is not easy to see why it should not be evidence against a successor as the admission of one of his predecessors. It was not of so much weight as a regular terrier, but still was *some* evidence to go to the jury With respect to the boundary of the divisions of the parish, the jury had to consider a great mass of discordant evidence, but it was admitted that the field in question was within the division subject to the modus, and if an occasional alteration of fences were sufficient to destroy a modus, the end might frequently be attained by trick and management.

The circumstance that the field had once been ploughed, would not alter the right when it became meadow again. There is no ground for granting the rule which has been prayed.

PARK J. The whole of the objection to the evidence which has been received, rests on the assumption, that the document in question was not a terrier. But it was not received as such. A terrier ought to come from the bishop's registry, and then it is unnecessary to prove the rector's handwriting. In the present case his handwriting was proved, and the instrument was received only as the statement of an interested person against himself. Suppose he had given a receipt for the modus: would not that have been evidence against a successor? The instrument in question was properly admitted upon the same principle as such a receipt.

BURROUGH J. The document was clearly evidence as an admission by a preceding rector, and the circumstance

1829.

MADDISON v. NUTTALL.

stance of a terrier from the bishop's registry being also produced could not be a ground for rejecting it. It was offered with a different intent, and stood on a footing different from the terrier. The boundary was altogether a question for the jury, and though modus for meadow land is no longer payable if it be converted into arable, yet if it be restored to meadow again, the modus still attaches.

GASELEE J. concurring, the rule was

Refused.

(IN THE EXCHEQUER CHAMBER.)

Nov. 13.

EDWARDS *v.* BENNETT.

(In Error.)

1. An assistant overseer, appointed under the 59 *G.* 3. *c.* 12., and having, by virtue of his office, the poor rate in his custody, is liable to a penalty for refusing to produce it to an inhabitant when lawfully demanded, according to the 17 *G.* 2. *c.* 3.

2. The declaration alleged that Defendant was assistant overseer; that a rate for the relief of the poor was made and duly allowed; and although Defendant, as such assistant overseer, had the rate in his possession, and although Plaintiff, at a reasonable time, demanded an inspection of it, and tendered 1*s.*, yet Defendant refused to produce it, whereby he forfeited 20*l.*:

Held, on motion in arrest of judgment, that the count was sufficient; for if the Defendant had the rate in his custody *as* assistant overseer, it might be presumed that it was his duty to produce it when lawfully demanded.

THE declaration alleged, that Plaintiff, before and at the time of the committing of the offence thereinafter mentioned, was an inhabitant of the parish of *Almondsbury*, in the county of *Gloucester*: that before

and

1829.

EDWARDS v. BENNETT.

and at the time, &c. the Defendant was the assistant overseer of that parish: and that, theretofore, to wit, on, &c. at, &c. the churchwardens and overseers made a certain rate for the relief of the poor of the said parish, and which rate was afterwards and before, &c. allowed by, &c. and published by the churchwardens and overseers of the poor of, &c.; and that afterwards, and at a reasonable time, to wit, &c. Plaintiff requested Defendant, as such assistant overseer, to permit him, Plaintiff, to inspect the said rate, and then and there tendered to him 1*s.* for the same. And although the Defendant then and there (as such assistant overseer) had the said rate in his possession, yet he would not permit the Plaintiff to inspect it, whereby Defendant forfeited for such offence 20*l.*, &c.

In *Michaelmas* term 1828, the Court of King's Bench discharged a rule for arresting the judgment, on the ground that it was not averred in the declaration that it was the duty of the Defendant, as assistant overseer, to exhibit the rate to the Plaintiff when requested. And upon a writ of error to this Court,

Ludlow Serjt. argued for the Defendant below. The declaration does not bring the Defendant below within either the words or the meaning of the 17 *G.* 2. *c.* 3. The words are, "That the churchwardens and overseers of the poor, or other persons authorized to take care of the poor in every parish, &c. shall permit all and every the inhabitants of the parish, &c. to inspect every such rate at all reasonable times," &c. The words "*other* persons authorized to take care of the poor," were probably introduced to include persons mentioned in the 9 *G.* 1. *c.* 7., which authorizes the farming out of the poor, and cannot apply to the present Plaintiff. Under the 59 *G.* 3. *c.* 12., assistant overseers are appointed; but they are not like deputy overseers, they are not the repre-

1829.

EDWARDS v. BENNETT.

representatives of the overseers in all their duties, but only in those for the discharge whereof they are specially appointed. The declaration should, therefore, have averred distinctly that it was the duty of the Defendant below, as assistant overseer, to produce the rate. The right of action is not founded on the mere possession of the rate by the Defendant below; he may have been entrusted with it for certain specific purposes, excluding the duty of exhibiting it. The allegation that the Defendant below had the rate, without the allegation that it was his duty to produce it, is therefore insufficient, *Max* v. *Roberts* (*a*), *Rex* v. *Everett* (*b*), *Sutton* v. *Johnstone.* (*c*) It makes no difference that this motion comes after verdict, for the Plaintiff below was only bound to prove the facts alleged in the declaration, and it cannot be presumed that any others were proved; *Spires* v. *Parker* (*d*); and therefore, unless these facts disclose a good cause of action, judgment must be arrested.

Campbell for the Plaintiff below. The argument on the other side would go to repeal the 17 *G.* 2. For the rate may be properly in the possession of the assistant overseer, and if he be unpunishable for refusing to produce it, and the overseer may excuse himself on the ground that the rate is properly in the possession of the assistant, the parishioner is without remedy. But an assistant overseer, appointed with all the powers of an overseer, is an overseer within the intent of 17 *G.* 2. He is a species under the genus overseer; and, after verdict at least, the allegation in this declaration is sufficient. It is alleged that he was assistant overseer, and, *as such*, had the rate in his possession. If facts are alleged from which the duty necessarily arises,

(*a*) 12 *East*, 89.
(*b*) 8 *B.* & *C.* 114.
(*c*) 1 *T. R.* 493.
(*d*) 1 *T. R.* 141.

the

the Court will take judicial notice of the duty; and it could not have been proved at the trial that he had the rate *as* assistant overseer, without shewing an appointment pursuant to 59 *G.* 3., on which the duty would necessarily appear.

TINDAL C. J. Two objections have been made to the record in this case. First, That an assistant overseer is not within the act 17 *G.* 2. *c.* 31., so as to be subject to the penalties imposed on overseers for non-observance of their duty to produce the parish rate when properly required; and,

Secondly, That there is no sufficient allegation of its being the duty of the Defendant to produce his rate.

We are of opinion that neither of the objections is tenable, and that the judgment must be affirmed.

As to the first, by the 17 *G.* 2. *c.* 31. *s.* 13., it is enacted, "That if any churchwarden or overseer of the poor, or other person authorised as aforesaid (*a*), shall not permit any inhabitant or parishioner to inspect the said rates, or shall refuse or neglect to give copies thereof as aforesaid, such churchwarden or overseer, or other person authorised as aforesaid, for every such offence, shall forfeit and pay to the party aggrieved the sum of 20*l.*, to be sued for and recovered by action of debt, bill, plaint, or information, in any of his majesty's courts of record." And it has been urged, that an assistant overseer does not fall within any of these descriptions. It may be said, indeed, that he is not an overseer or churchwarden; but whether he be a person authorised to have the care of the poor, must depend on the nature of his appointment. By the 59 *G.* 3. *c.* 12. *s.* 7., it is enacted, "That it shall be lawful for the inhabitants of any parish, in vestry assembled, to nominate and elect any discreet person or persons to be assistant overseer or overseers

(*a*) "To take care of the poor," *s.* 1.

1829.

EDWARDS v. BENNETT.

of the poor of such parish, and to determine and specify the duties to be by him or them executed and performed, and to fix such yearly salary for the execution of the said office, as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of his majesty's justices of the peace, and they are hereby empowered, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor, for such purposes, and with such salary, as shall have been fixed by the inhabitants in vestry."

If by this enactment he is a person authorised to have the care of the poor, he comes within the operation of 17 *G.* 2. And it would be a narrow construction of that statute, to confine its operation to offices known at the time of its enactment, when it contains general words, comprehensive enough to embrace an office created afterwards for the same purposes.

But it has been argued, that even if he be within the operation of the former statute, it does not sufficiently appear in this record. Had the objection been made on demurrer, it must have prevailed; but there is enough to enable us to intend, after verdict, that he was found to be a person liable to the penalties of the act. The declaration alleges that he was assistant overseer. That allegation could not have made out in proof, without putting in the warrant by which he was appointed; which having been before the judge, and subject to the observations he would make upon it to the jury, we may assume from the verdict that the duties prescribed were such as brought him within the operation of the statute. The declaration then goes on to state, that the rate-book being in his possession as assistant overseer, he was required to produce it; and after verdict we cannot intend that his possession was not legal. In either view of the case, therefore, whether he was a person authorised

rised to have the care of the poor, or legally had the custody of the rate-book, there was sufficient to bring him within the operation of the statute; and we cannot be called on to intend, after verdict, that he is not to discharge duties, without proof of which the verdict could not have passed. *Rex* v. *Everett* is altogether distinguishable. There, an information stated that certain goods were about to be imported into *Great Britain* from parts beyond the seas, in respect of which certain duties would be payable; that one *R. H.* at the time of committing the offence thereinafter mentioned, was a person employed in the service of the customs, and that it was the duty of him, as such person so employed in the service of the customs, to arrest and detain all such goods as should be imported, which upon such importation would become forfeited to the king by virtue of any act of parliament relating to the customs, and which would be liable to be seized; and that the Defendant, well knowing, &c. unlawfully and corruptly solicited *R. H.* being such person so employed in the service of the customs, when certain goods should be imported, which upon importation would be liable to be seized or forfeited, to forbear to arrest and detain the same, &c. It was held, that inasmuch as it was not the duty of every person employed in the service of the customs to arrest and detain goods which would be liable to be seized as forfeited, the count was bad for want of shewing that *R. H.* was a person whose duty it was to arrest and detain such goods.

But here the count alleges, that the Defendant had the possession of the rate *as* assistant overseer; an allegation which could not have been proved without shewing the appointment, in which the Defendant's duty would sufficiently appear.

Judgment affirmed.

Nov. 14.

HOULDEN *v.* FASSON.

Where an affidavit is sworn by two deponents, the names of both must be specified in the jurat.

MEREWETHER Serjt., in shewing cause against a rule obtained by *Wilde* Serjt., objected that the affidavit, on which the rule had been obtained, was defective in the *jurat*. The affidavit had been sworn by two persons, and the *jurat* stated it to have been sworn by "both the deponents," without specifying their names severally. By a rule of the King's Bench, both names are to be named in the *jurat*, and the affidavit is to be excluded if the *jurat* contain any interlineation or erasure.

The secondary stated, that the practice in this court was the same.

Wilde contended there was no rule on the subject in this court, and that the first branch of the rule in the King's Bench was only directory.

Upon the report of the officer, however, the Court discharged the rule, but without costs. They added, that the practice as to the *jurat* ought to be observed strictly; and that, in future, they would discharge with costs a rule under similar circumstances.

Nov. 14.

ADDIS *v.* THOMAS.

A new rule to plead must be given after amendment of the declaration, although the amendment be on payment of costs.

ON the 28th of *July* the Plaintiff, after a rule to plead and time allowed for pleading, obtained leave to amend his declaration upon payment of costs; and afterwards signed judgment for want of a plea, without giving a new rule to plead.

Russell

1829.

ADDIS v. THOMAS.

Russell Serjt. obtained a rule *nisi* to set aside the judgment for irregularity, on the ground that the Defendant ought to have had a new rule to plead.

Wilde Serjt., *contrà*, contended, that where the Plaintiff paid costs upon amending, the Defendant was entitled to no imparlance, and therefore it was not necessary to give a new rule to plead. *Cromp.* 130.

But the *Court*, on the report of the secondary, held that a new rule to plead must be given, whether the amendment were on payment of costs or not. (*a*)

Rule absolute.

(*a*) See *Tidd*, 475. and the authorities there cited.

PHILLIPS *v.* TANNER.

Nov. 16.

Where the Defendant died before the application, the Court refused to amend a *fi. fa.* by inserting the *testatum* clause.

WILDE Serjt. had obtained a rule *nisi*, calling on the Plaintiff to shew cause why a writ of *fieri facias* issued in this cause should not be set aside for irregularity, and the money levied under it be paid to the administrator *cum testamento annexo* of the Defendant, who had died since the issuing of the writ.

Taddy Serjt. at the same time obtained a rule *nisi* to amend the writ by inserting the *testatum*, the omission of which was the ground relied on for setting it aside; and he relied on *Meyer* v. *Bing* (*a*), where this court permitted a *fi. fa.* to be amended by the insertion of the *testatum* clause.

Wilde. Such amendments are only allowed when third persons are not affected, and no new interests have

(*a*) 1 *H. Bl.* 541.

1829.

PHILLIPS v. TANNER.

intervened. In *Inman* v. *Huish* (*a*), the Court refused to amend a *testatum capias*, because the bail would be affected by the amendment. In *Hunt* v. *Pasman* (*b*), the Court refused to amend a *fi. fa.* where the Defendant had become bankrupt before sale of the goods taken under it; and in *Johnson* v. *Dobell* (*c*), the Court refused to permit a *capias* to be amended, unless the plaintiff would consent to discharge the bail on the defendant's entering a common appearance.

Taddy. An administrator stands in the same situation as the Defendant, especially after execution executed, as here; his situation is very different from that of bail or assignee.

TINDAL C. J. This case falls within the exception to ordinary cases of amendment. The insertion of the *testatum* is not a matter of importance, and would be permitted in ordinary cases. But it is a good ground of distinction, if the Court can see that the parties are not in the same situation. Here, the Defendant has died since the execution of the writ, and the administrator who succeeds may have suffered a judgment for the benefit of other creditors. At all events, the interest of others may be affected. The rule for the amendment, therefore, must be discharged, and the rule for setting aside the writ be made

Absolute.

(*a*) 2 *N. R.* 133. (*b*) 4 *M. & S.* 329. (*c*) 1 *M. & P.* 28.

1829.

HUGHES *v.* BRETT.

Nov. 16.

Affidavit "that Defendant was indebted to Plaintiff on a bill drawn by *M. D.* upon and accepted by Defendant and indorsed by *M. D.* to Plaintiff" (without saying that the bill was drawn payable to order), Held sufficient to hold Defendant to bail.

JONES Serjt., obtained a rule *nisi* to set aside the bail-bond in this case, for an alleged defect in the affidavit to hold to bail.

The Plaintiff had deposed that the Defendant was indebted to him in the sum of 250*l.* "on a bill of exchange drawn by *M. J. J. Donlan* upon and accepted by the Defendant, and indorsed by *M. J. J. Donlan* to the Plaintiff."

It was objected, that as the bill was not stated to have been made payable to order, it did not appear that *Donlan* had any authority to transfer it by indorsement, or in what character the Plaintiff was entitled to sue: and *Balbi* v. *Batley* (*a*), was relied on, where an affidavit that the Defendant was indebted on promissory notes, without saying that they were given, or payable, or indorsed to the Plaintiff, was holden insufficient.

Wilde Serjt., who shewed cause, relied on *Bradshaw* v. *Saddington* (*b*), confirmed by *Bennett* v. *Dawson* (*c*), where the Court admitted that the cases were conflicting, and that, therefore, they must have recourse to common sense; they then said, that the true principle was to support the affidavit, if perjury could be assigned on it: and held an affidavit precisely similar to the present to be sufficient.

Jones. *Bradshaw* v. *Saddington*, on which the Court relied in *Bennett* v. *Dawson*, was decided on a wrong

(*a*) 6 *Taunt.* 25.
(*b*) 7 *East*, 94.
(*c*) 4 *Bingh.* 609. 1 *M. & P.* 594.

1829.

HUGHES v. BRETT.

principle; namely, that if it was sworn the defendant was indebted, and in a sufficient amount, perjury might be assigned. But it would not be safe to deprive a defendant of his liberty without calling on the plaintiff to shew the character in which he sued, or at least that he had authority to sue: for the Defendant might be indebted, and to a great amount, and yet the debt might be one on which the Plaintiff might have no right to hold him to bail; as an equitable debt; and on the allegation of which, therefore, it might be impossible to indict him for perjury. In *Bennett* v. *Dawson* it was sworn, that the defendant was indebted for money *lent* on a bill of exchange, which entirely distinguishes it from the present case, as the loan was sufficient to constitute a debt. In *Cathrow* v. *Hagger* (*a*) and *Fenton* v. *Ellis* (*b*), it was holden not sufficient to depose that the defendant was indebted for goods sold and delivered, without adding "by the plaintiff." And *Balbi* v. *Batley* was subsequent to *Bradshaw* v. *Saddington*.

TINDAL C. J. We think the affidavit is sufficient. It states that the Defendant was indebted to the Plaintiff in the sum of 250*l.* on a bill of exchange, drawn by *M. J. J. Donlan* upon and accepted by the Defendant, indorsed by *M. J. J. Donlan* to the Plaintiff, and now due and unpaid. The only objection is, that it is not stated the bill was drawn payable to order. Now the Defendant, as acceptor, is the person primarily liable to pay the bill; and it was unnecessary for the holder to shew whether he claimed through one or many indorsements. It was sufficient for him to say generally, that the bill passed to him by indorsement, on which allegation, if the fact were not so, perjury might have been assigned. Whatever may have been laid down on the

(*a*) 8 *East*, 106. (*b*) 6 *Taunt.* 192.

subject

subject in prior decisions, it is better to adhere to the last, and not involve Plaintiffs in distinctions too subtle for ordinary apprehensions. If the Court can see that there is a sufficient debt existing, that it is alleged with sufficient precision to save the Defendant from being arrested a second time for the same cause, and that perjury can be assigned on the affidavit, all has been done that can reasonably be required. This was the principle on which the Court decided in *Bennett* v. *Dawson*, and to this it is better we should now adhere.

PARK J. In *Bennett* v. *Dawson*, the Court endeavoured to get at a sound principle, and I think we ought not to recede from that decision.

BURROUGH J. The affidavit is sufficient; and if we had heard it at first, we should not have granted a rule *nisi*.

GASELEE J. I should think the rule *nisi* ought to have been granted; and it is only on the authority which has been cited to-day, that I am prepared to say the affidavit is sufficient. I am not sure that *Bennett* v. *Dawson* is quite in point, because there it appeared on the affidavit, that, independently of the bill of exchange, the Defendant was indebted for money lent. But *Bradshaw* v. *Saddington* was quoted and relied on in that case; and on the authority of that decision I hold the present affidavit sufficient. If, instead of one, there had been ten indorsements in this case, it would not have been necessary for the Plaintiff to have traced the whole chain: and as it does appear the bill was accepted by the Defendant and indorsed to the Plaintiff, a sufficient title is shewn, and the rule must be

Discharged.

1829.

Nov. 17.

CHARRINGTON *v.* LAING.

In an action on the case, Defendant gave a *cognovit* for 200*l.*, with a defeasance conditioned for the performance of various matters by a given time, and performed the matters (in part at least) within two months after the time stipulated. Plaintiff having issued execution on the *cognovit*, the Court referred it to the prothonotary, to see how much, if any thing, ought to be paid to the Plaintiff.

THE Defendant having been sued for damages occasioned by his breaking up a highway, gave in *December* last a *cognovit* for 200*l.*, with a defeasance, under which it was provided, that execution should not be sued out if the road were reinstated to the satisfaction of *Smith*, a surveyor, by the 15th of *April*. The Defendant paid the Plaintiff's costs; but the road was not reinstated to *Smith*'s satisfaction till the middle of *June*, and the Plaintiff sued out execution for the 200*l.* on the 4th of *May*.

The defeasance was as follows: — That if Defendant should pay to Plaintiff his costs, and reinstate the road to the satisfaction of *Smith*, by the 15th of *April* 1829, (according to various minute stipulations therein set forth), it was thereby agreed that the Defendant, from time to time, and at all times, duly and properly fulfilling all and every the articles, agreements, and stipulations aforesaid, no judgment should be entered up, nor execution thereon be issued for the damages, costs, charges, and expenses aforesaid, or any part thereof; but in case default should at any time be made in performance of any one or more of the said several articles, agreements, and stipulations thereinbefore contained on the part of deponent, the said Plaintiff was to be at full liberty forthwith to enter up judgment for the said damages, costs, charges, and expenses, and to issue one or more writ or writs of execution on the said judgment for the said damages, costs, charges, and expenses, or so much thereof as might then remain unpaid."

Jones Serjt. obtained a rule *nisi* to set aside the execution, upon affidavits containing the above statement; alleging also the impracticability of making a road in the

the winter months, and that *Smith's* attendance could not be procured till the middle of *April*, when he gave further orders, which were attended to.

Taddy and *Wilde* Serjts. shewed cause on affidavits, which stated, that the Defendant had, previously to the *cognovit*, repeatedly violated his engagement to reinstate the road; that the road was not yet completed; that the winter was a proper season for road-making; and that the Plaintiff and others along the line of road had suffered great inconvenience from its long continuance in an unfinished state. They argued, that the Court could not estimate the inconvenience and damage the Plaintiff had sustained by being obliged to resort to other roads; that the *cognovit* was in the nature of liquidated damages agreed on by the Defendant, and that the Court had not authority to interfere. In cases of judgments entered up under warrants of attorney, the Court interposed by virtue of their jurisdiction over the warrant, and the statute of *W.* 3., requiring an assignment of breaches and assessment of damages on them, was confined to bonds.

Jones. The 200*l.* is in the nature of a penalty to secure the performance of the Defendant's undertaking. The defeasance contains many stipulations of various degrees of importance; and as it is not stated in respect of which of them the 200*l.* is to be paid, it cannot be considered as liquidated damages; *Kemble* v. *Farren* (*a*), *Astley* v. *Weldon.* (*b*) It would be unjust that the Plaintiff should have the penalty after the road has been reinstated. At all events, the Court will refer it to its officer to see whether the road be in a proper state or not; and if not, to ascertain how much ought to be paid to the Plaintiff in respect of the deficiency, or of any damage occasioned to him by the delay.

(*a*) 6 *Bingh.* 141. (*b*) 2 *B.* & *P.* 346.

TINDAL

1829.

CHARRINGTON v. LAING.

TINDAL C. J. We do not say that a *cognovit* may not be so worded as to render the sum secured by it payable in the same way as liquidated damages. But the question here is, Whether we can consider this *cognovit* as any other than a security by penalty for certain work to be done by the Defendant. In the defeasance there are stipulations of various degrees of importance; and as it would be unjust to say that if the road were completed only one day after the term agreed on, the Defendant should pay the whole 200*l.*, it would be equally so to say he should pay the whole after performance of a portion of the work. We must, therefore, refer it to the prothonotary to ascertain what has been done; what damage, if any, the Plaintiff has sustained; and how much, if any thing, ought to be paid to the Plaintiff.

Referred to the prothonotary accordingly.

Nov. 17.

HARGREAVE *v.* SMEE.

I do hereby agree to guarantee the payment of goods to be delivered in umbrellas and parasols to *J.* and *E. A. S.*, according to the custom of their trading with you, in the sum of 200*l.*:

Held, a continuing guaranty.

THIS was an action of *assumpsit*, and the declaration contained two special counts upon the guaranty hereafter mentioned; counts for goods bargained and sold to the Defendant, and delivered to *John* and *Edward Augustus Smee*; and a count upon an account stated between the Plaintiff and the Defendant. The Defendant pleaded the general issue. The cause was tried before *Tindal* C. J. *London* adjourned sittings after last *Trinity* term, when a verdict was found for the Plaintiff for 200*l.*, subject to the opinion of the Court on the following case: —

On the 5th of *June* 1828, the Defendant signed the following guaranty: —

"5th of *June* 1828.

"Mr. *John Hargreave*,— I do hereby agree to guarantee the payment of goods to be delivered in umbrellas and

and parasols to *John* and *Edward Augustus Smee*, at No. 38. *Milk Street, Cheapside, London*, according to the custom of their trading with you, in the sum of 200*l.* I am, &c. J. SMEE."

The custom of trading between the Plaintiff and Messrs. *John* and *Edward Augustus Smee*, the sons of the Defendant, was to make up monthly accounts of goods delivered between the 20th day of each month, and the 20th day of the next succeeding month; and upon such making up and adjusting the account, acceptances of the said Messrs. *J.* and *E. A. Smee* were given for the amount of each monthly account, payable at three months' date.

The Plaintiff had sold and delivered to *J.* and *E. A. Smee*, since the 5th *June* 1828, and previously to the commencement of this action, umbrellas and parasols, according to the custom of their trading with the Plaintiff, amounting altogether to the sum of 520*l.* 8*s.* 2*d.*

The said *J.* and *E. A. Smee* had, since the sale and delivery of the umbrellas and parasols to them, paid the Plaintiff various sums of money on account of the umbrellas and parasols so sold and delivered, which amounted altogether to 276*l.* 1*s.* 5*d.*; that is to say,

	£	s.	d.
For the amount of umbrellas and parasols sold and delivered on and from the 5th *June* 1828 to the 20th of the same month. - - -	31	18	8
Ditto, from 20th *June* to 20th *July* following. - - -	24	10	11
Ditto, from 20th *July* to 20th *August* following. - - -	59	12	3
Ditto, on account of umbrellas and parasols sold and delivered from 20th *August* to 20th *September*. - -	160	0	0
	£276	1	5

There

1829.

HARGREAVE v. SMEE.

There remained due from the said *J.* and *E. A. Smee* to the Plaintiff, on the balance of the said account, for umbrellas and parasols so sold and delivered since the 17th *September* 1828, the sum of 200*l.* and upwards.

The credit and time for the payment of the price of the said goods, according to the said custom of trading between the Plaintiff and *J.* and *E. A. Smee*, had elapsed at and before the time of the commencement of this action. And the said *J.* and *E. A. Smee* had, before the commencement of the action, been applied to by the Plaintiff for the balance so remaining due to the Plaintiff, and had not paid the same; whereof the the Defendant had notice before the action was brought, and was requested by the Plaintiff to pay him the said sum of 200*l.* upon his said guaranty.

The question for the opinion of the Court was, Whether the said guaranty was a continuing guaranty or not? And if the Court should be of opinion that it was a continuing guaranty, the verdict was to be entered for the Plaintiff as aforesaid; but if the Court should be of a contrary opinion, then a nonsuit was to be entered.

Wilde Serjt. for the Plaintiff. This was a continuing guaranty. The Court will construe the instrument according to the intention of the parties to be collected from it; and if there be any doubt, will take it most strongly against the party bound. When, as here, the agreement is between parties in trade, it will be construed liberally, *propter simplicitatem laicorum*. As the goods were to be delivered according to the custom of their trading, and the jury have found that it was the custom of the parties to account monthly, there must have been a previous dealing, and a continuing engagement must have been contemplated. In *Mason* v. *Pritchard* (*a*), the guaranty was "for *any*

(*a*) 12 *East*, 227.

goods"

goods" *Mason* hath or may supply my brother *W.P.* with, to the amount of 100*l.*; and in *Merle* v. *Wells* (*a*), "for *any* debt my brother may contract for goods necessary in his business as a jeweller, not exceeding 100*l.* after this date:" both of which instruments the Court held to be continuing guaranties. In *Melville* v. *Hayden* (*b*), where the guaranty was holden to be limited, the language was "to the extent of 60*l.* for goods to be purchased." There was no allusion to any course of business, nor was the guaranty for *any* goods that might be furnished.

Spankie Serjt. *contrà*. The principle laid down in *Wright* v. *Russell* (*c*), *Pearsall* v. *Summerset* (*d*) and other cases, is, that a surety is not to be charged beyond the precise terms of his engagement; and the Defendant's guaranty would be satisfied by one delivery of goods to the extent of 200*l.* The expression, "according to the custom of their trading," does not necessarily denote that there had been any previous dealing, and may be satisfied by a future delivery upon a single occasion according to the custom of persons engaged in the same trade. In like manner it was holden, that the stipulation for a quarterly account in *Melville* v. *Hayden* was applicable only to a future dealing, and would not constitute a continuing guaranty. That case cannot be distinguished from the present; and it would not follow, even if there had been a previous dealing, that the guaranty would be a continuing engagement. In *Kirby* v. *Duke of Marlborough* (*e*), the guaranty was held to be restricted to an advance once made to the extent guarantied, although the condition of the bond was "for the payment to *Kirby* of all such sum or sums of money, not exceeding 3000*l.* with lawful interest,

(*a*) 2 *Campb.* 413.
(*b*) 3 *B.* & *A.* 593.
(*c*) 2 *W. Bl.* 934.
(*d*) 4 *Taunt.* 593.
(*e*) 2 *M.* & *S.* 18.

which

1829.

HARGREAVE v. SMEE.

which should or might, at any time or times thereafter, be advanced and lent by *Kirby* to *Coburn*, or paid to his use by his order and direction, to enable him to carry on the trade in which he was engaged;" and that is a much stronger case than the present. In *Evans* v. *Whyle* (*a*) *Best* C. J. said, that the construction of these instruments ought to be strict. In *Bastow* v. *Bennett* (*b*) and other cases the guaranty has been held continuing on the strength of the word *any*, which shews the engagement is not to be confined to one dealing, and which is not employed in this guaranty.

Wilde. In *Kirby* v. *Duke of Marlborough* it was clearly indicated by the recital of the deed, that the guaranty was to be limited to one set of advances; it being stated there, that *Coburn* had occasion for divers sums of money, not exceeding in the whole 3000*l.*, to enable him to carry on the trade in which he was engaged.

TINDAL C. J. The question is, What is the fair import to be collected from the language used in this guaranty? The words employed are the words of the Defendant in this cause, and there is no reason for putting on a guaranty a construction different from that which the Court puts on any other instrument. With regard to other instruments the rule is, that if the party executing them leaves any thing ambiguous in his expressions, such ambiguity must be taken most strongly against himself. From the present agreement, I collect that there were two parties already in a course of dealing: when the Defendant goes to guarantee the payment of goods to be delivered according to their custom of trading, I cannot but imply there had been some preceding dealing, and I am confirmed in this by the finding of the jury, that the custom of the parties was to

(*a*) 5 *Bingh.* 485. (*b*) 3 *Campb.* 220.

make

make up certain monthly accounts. I collect, thence, an intention that this course of dealing should continue, which would render the guaranty a continuing guaranty. If we were to put on it the limited construction which has been contended for, we should deprive the party of the benefit which appears to have been contemplated. If one supply of goods to the extent of 200*l.* would satisfy the stipulation in dispute, there is no course of trading to which the words, "in their course of trading," could be applied. The cases on this subject run so nearly into each other that it is difficult to reconcile them; but the distinction between this case and *Melville* v. *Hayden* is, that here the Defendant meant to keep two persons engaged in trade, in their established custom of trading. The verdict must be entered for the Plaintiff.

PARK J. It has been conceded, that all these cases must be decided, each on its own ground; and, therefore, it is useless to refer to the decisions, except for any principle which may be incidentally laid down in them. The only question of principle which has been agitated on the present occasion is, whether these instruments are to be construed strictly; and I am not disposed to hold the doctrine which has been imputed to Lord *Wynford*, that a guaranty ought to receive a strict construction. That was not the principle adopted in *Mason* v. *Pritchard*, by Mr. Baron *Wood*, who tried the cause, and the very learned persons who decided it in the Court of King's Bench. They all held it to be a continuing guarantee, and said it must be taken as strongly as possible against the party who executed it. The true sense has been put by my Lord Chief Justice on the words, "delivery according to their custom of trading;" and when we consider that the persons to whom the goods were to be delivered were the

1829.

HARGREAVE v. SMEE.

sons of the Defendant, we should defeat the intention of the parties if we were to hold that his liability was determined upon a single delivery of goods to the amount of 200*l.*

There is enough here to shew that the guaranty was to continue till notice should be given to determine it.

BURROUGH J. I hope the time will come when more reliance will be placed on principles than on cases. I have no doubt as to the intention of the parties here; they allude to their custom of trading, which has been found to apply to an accounting monthly; the custom is continuing, and the obligation must be continuing also. These are commercial agreements, and ought to receive a liberal, not a strict construction. I have no doubt of the meaning here, and the verdict ought to be entered for the Plaintiff.

GASELEE J. I have great difficulty in deciding this case, and am rather inclined to come to a different conclusion. It is hard to distinguish it from *Melville* v. *Hayden*: there the parties were to account quarterly, and yet the Court held the guaranty to be restricted to a single dealing. There are, however, other facts in this case, which are in favour of the decision which the Court has pronounced.

Judgment for the Plaintiff.

1829.

The KING *v.* The Sheriff of MIDDLESEX, in the cause of LOGAN *v.* LOUEL.

Nov. 18.

Where added bail are, upon a discovery made subsequent to their allowance, rejected by the Court, the bail below (their names remaining on the recognizance) are, before the rejection of the bail above, competent to render the Defendant.

SPANKIE Serjt., on the part of the bail to the sheriff, the Defendant's attorney, obtained a rule *nisi* to discharge an attachment against the sheriff on an affidavit, which stated, that bail above was put in on the 25th of *June*; that upon notice of exception two new bail were added, and that on the 30th *June* notice of allowance of such added bail was served on the Plaintiff; that on the 1st *July* the Plaintiff obtained a rule, calling on the Defendant to shew cause why the rule for the allowance of the said bail should not be set aside, and calling on *Walden*, one of the added bail, to appear in Court, and answer such matters as should be demanded of him; that this rule was made absolute on the 6th of *July*; that the present attachment was issued on the 7th, but that the bail below, his name still appearing on the recognizance, had on the 8d of *July* rendered the Defendant in discharge of his bail; that this application was made on the part of the bail below at his own expence, for his only indemnity, and without collusion with the Defendant.

Wilde and *Jones* Serjts. shewed cause on an affidavit which stated that added bail in the cause had, after allowance, been rejected upon examination in Court, and that the sheriff had taken but one surety, who was the attorney in the cause.

They objected, that the affidavit in support of the application did not state, as it ought to have done, that the applicant was not indemnified by the Defendant; — that the application ought to have been made by the sheriff, and not by the sheriff's bail; — that a sheriff

1829.

The KING v. The Sheriff of MIDDLESEX.

who took but one surety, and that surety the attorney in the cause, was entitled to no favour; *George* v. *Barnes* (*a*), *R.* v. *Sheriff of London* (*b*); — but above all, that where the added bail were rejected, the bail below were not competent to render the Defendant; *Brown* v. *Jennings* (*c*); they ceased to be bail when new bail were added: and the added bail, if rejected, were equally out of the cause. In *Mills* v. *Head* (*d*) it was expressly decided, that for this reason rejected bail were incompetent to surrender the Defendant.

Spankie. While the names of the original bail are on the bail-piece, they are liable to an action, and, therefore, competent to surrender the Defendant. *Wilde* v. *Harden.* (*e*) In *Bell* v. *Gate* (*g*) *Heath* J. said, "This Court has in several instances freed the practice from the niceties which formerly prevailed in it respecting bail. It was once held, that after bail had been rejected they could not surrender their principal. It is now held, that they may enter into a new recognizance for the purpose of making the render, and that any persons whatsoever, even if they come out of *Newgate*, may become bail for that purpose." And in *Hale* v. *Walker* (*h*) the Court said that any bail was sufficient, even such as had not justified. *Edwin* v. *Allen* (*i*), and *Rex* v. *Sheriff of Essex* (*k*), are authorities to the same effect. And *Brown* v. *Jennings* is distinguishable, because there the Court acted on the ground that the bail above had been contumacious, and that the defendant was seeking to derive an advantage from his own misconduct. The circumstance that the sheriff took the attorney as a surety is no bar to relief. *Jackson* v. *Trinder.* (*l*) As to the affidavit,

(*a*) 1 *Chitty*, 8.
(*b*) 2 *Bingh.* 227.
(*c*) 2 *B.* & *A.* 768.
(*d*) 1 *N. R.* 137.
(*e*) 8 *Mod.* 281.
(*g*) 1 *Taunt.* 163.
(*h*) 1 *H. Bl.* 638.
(*i*) 5 *T. R.* 401.
(*k*) 5 *T. R.* 633.
(*l*) 1 *W. Bl.* 1181.

it

1829.

The KING v. The Sheriff of MIDDLESEX.

it is in the form prescribed by the rule of the Court of King's Bench.

Cur. adv. vult.

TINDAL C. J. This was a rule obtained by the bail below for setting aside an attachment against the sheriff of *Middlesex* for not bringing in the body; and the main question is, Whether the render by the bail is good?

As to which, it appeared that bail above was put in on the 25th of *June*, and notice of exception having been given, two new bail were added; and on the 30th of *June* notice of allowance of such added bail was served on the Plaintiff.

On the 1st of *July*, the Plaintiff obtained a rule to shew cause on *Friday* then next, why the rule for the allowance of the said bail should not be discharged; and that *Walden*, one of the added bail, should appear personally in Court to answer such matters as should be demanded of him. Cause was shewn against this rule on *Monday* the 6th, when the same was made absolute; and the attachment against the sheriff issued on the 7th.

In the meantime, however, viz. on *Friday* the 3d *July*, the names of the original bail, and also of the added bail, still appearing on the recognizance, the Defendant was rendered in discharge of his bail generally, and committed to the Fleet. And the question is, Whether this is a valid render? and we are all of opinion that it is.

If the second bail had been rejected on the day they came up to justify, there is no doubt but that the Defendant might have been rendered by the first bail at any time during the sitting of the Court.

The first bail appear to be liable up to the time of justification of the second bail. But in this case the justification of the second bail by matters *ex post facto*, became a nullity; and the second bail are to be considered as if they had never been put in at all.

1829.

The KING v. The Sheriff of MIDDLESEX.

The first bail, therefore, being still upon the recognizance, no step having been taken to remove their names, still remained liable to the Plaintiff, and, consequently, capable of rendering the Defendant.

The present case, therefore, is distinguishable from the case of *Mills* v. *Head*, where the bail who had made the render had been rejected, which these first bail had not; and also from the case of *Brown* v. *Jennings*, where the render was made by the bail, whose justification was afterwards set aside by the Court, on the ground of perjury.

And when it is considered that the Plaintiff, by the render of the Defendant, has the very security which he originally contemplated when he arrested his person, it is not to be wondered at that the cases have gone such length in allowing renders in discharge of the bail.

Thus a render by bail before they have justified, even though notice of exception has been given, — in the King's Bench; — a render by rejected bail, whilst their names remain on the bail-piece, — in this court; — a render by rejected bail, who have entered into a new recognizance for the mere purpose of rendering, — have all been held to discharge the bail.

As to the objection that the party applying does not sufficiently deny that he has been indemnified, we think the affidavit sufficient, as it follows the very words of the rule in B. R., which has been adopted by practice in this court. And as to the application being made by the sheriff's bail, and not by the sheriff himself, we observe that has occurred in many instances, and there appears no reason against it.

On the whole, therefore, we think the rule for setting aside this attachment against the sheriff ought to be made absolute.

Rule absolute accordingly.

Wilde now prayed that the bail-bond might stand as a security, but the Court refused.

1829.

LEGGETT *v.* FINLAY.

Nov. 20.

WILDE Serjt. obtained a rule *nisi* on the part of the Plaintiff, to set aside the award in this case, on the ground that it had not been made till after the expiration of the arbitrator's authority.

The matter had been referred under a judge's order, according to which the award was to be made by the first day of *Trinity* term, or such further day as the arbitrator should appoint by indorsement on the order.

The arbitrator enlarged the time once by indorsement, but the enlarged period being nearly elapsed, the Plaintiff's attorney, at the arbitrator's request, on the 7th *July* obtained another judge's order, which was made a rule of court, authorizing the arbitrator further to extend the time to the fourth day of this term, and served this order on the arbitrator.

The arbitrator then appointed another meeting for the 21st of *October*, which the Defendant attended; but the Plaintiff absented himself, alleging as a ground for so doing, that he had been unable to procure a meeting of certain surveyors, who were to have given a joint opinion. The arbitrator made his award on the 28th of *October*, without any further indorsement on the original judge's order.

Adams and *Bompas* Serjts. shewed cause. The time having been enlarged by a judge's order, a second indorsement was unnecessary; and it is doubtful whether the arbitrator had authority to make more than one. The time for making an award may be enlarged by a judge's order, with as much propriety as the cause may be originally referred by such order. But even if it were otherwise, as the Plaintiff himself procured the order for enlarging the time at the arbitrator's request, and

By a judge's order, an award was to be made by the first day of *Trinity* term, or such further day as the arbitrator should appoint by indorsement on the order. The arbitrator enlarged the time by indorsement, and before the expiration of the enlarged time, one of the parties, at his request, procured a judge's order for a further enlargement, which was acted on by all parties, and the arbitrator made his award beyond the time of the first enlargement, but within the time so further enlarged, but made no further indorsement on the original order: Held, that he had authority for making his award.

1829.

LEGGETT v. FINLAY.

as he never assigned the want of authority as a reason for not attending the meeting of the 21st *October*, he must be taken to have assented to the enlargement. In *The King* (in aid of *Mitton*) v. *Hill* (*a*), where the defendants in an extent in aid withdrew their pleas, and suffered judgment to be entered up upon an agreement to submit to arbitration the question of the amount of what was due to the prosecutor, provided the award should be made by a given time, and the arbitrator did not make his award till after the expiration of a further period, to which it had been agreed to extend the time in consequence of the Defendant having delayed to furnish him with the name of a trustee, and the Defendant's solicitor afterwards wrote a letter, requiring that the arbitrator would take into consideration matters not before him during the reference, — it was held by the Court, that under those circumstances the delay in making the award had not invalidated it, for that the conduct of the Defendant, and the solicitor's letter, was equivalent to a consent to extend the time. And in *Matson* v. *Trower* (*b*), an award was held good, though made by an umpire, the arbitrators having no authority to appoint one, and though he examined the parties separately, they having attended him and made no objection.

Wilde. The judge's second order was no sufficient authority for enlarging the time, at least without an indorsement by the arbitrator; and as to the supposed assent by the Plaintiff, it would be without mutuality, and, therefore, without effect, unless accompanied with an assent on the part of the Defendant.

TINDAL C. J. This rule must be discharged. The objection to the award is, that according to the power originally delegated to the arbitrator, the time for making

(*a*) 7 *Price*, 636. (*b*) 1 *R. & Mood.* 17.

his

1829.

LEGGETT v. FINLAY.

his award could only be enlarged by indorsement in his hand-writing. It seems to be admitted on the part of the Plaintiff, that such a power is not confined to a single enlargement of the time; but it is urged that there is here no indorsement to warrant the second enlargement. If, however, it appears that the parties consented to make an application for a judge's order to authorise a second enlargement, we think that a sufficiently formal mode of concurring in the enlargement to warrant the arbitrator in proceeding; and the only question here is, Whether there be sufficient evidence of such concurrence. Now here the Plaintiff concurs in applying for the order, at the request of the arbitrator; he shews a readiness to act under it, and when a meeting is appointed absents himself, not on the ground that the arbitrator was without authority, but because he had been unable to effect a meeting of certain surveyors. As to the mutuality of consent, which it is said ought to appear on the part of the Defendant, to make the Plaintiff's consent available, we think it sufficiently appears by the Defendant's attending the meeting in question.

PARK J. and BURROUGH J. concurred.

GASELEE J. I was disposed to think at first that this enlargement was made without authority; but upon hearing the circumstances of the case, I think a sufficient authority has been shewn. It is clear that parties may confer a sufficient authority by consent; — as by attending meetings; — and here, what is equivalent to consent has taken place on both sides.

Rule discharged.

1829.

Nov. 20.

TOWLER *v.* CHATTERTON.

Plaintiff sued in *Hilary* term, 1829, on a debt which accrued more than six years before: Held, that the 9 *G.* 4. *c.* 14., which came into operation on the 1st *January* 1829, precluded him from recovering on an oral promise to pay the debt, made by Defendant in *February* 1828.

ASSUMPSIT for the agistment of cattle. The action was commenced in *Hilary* term 1829. At the trial before *Best* C. J., *Lincoln Lent* assizes, it appeared that the debt was, at the time the action commenced, of more than six years' standing, but that in *February* 1828 the Defendant said to the Plaintiff's brother, "I owe your brother seven or eight pounds, and if I do, he shall have it; I wish that nobody should lose any thing by me." And at another time, "Your brother *Ned* wants seven or eight pounds from me: we must settle it. Nobody shall lose by me." The jury held this to be a promise to pay.

On the part of the Defendant it was objected, that by the 9 *G.* 4. *c.* 14., which passed *May* 9. 1828, but by section 10. was to commence and take effect on the 1st of *January* 1829, it is enacted, "that in actions of debt, or upon the case, grounded on any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments (statute of limitations, 21 *Jac.* 1. *c.* 16.) or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby."

The learned Chief Justice nonsuited the Plaintiff, on the ground that the promise should have been in writing, giving to the Plaintiff leave to move to set the nonsuit aside. Accordingly

Merewether Serjt., in *Easter* term last, moved the Court

1829.

TOWLER v. CHATTERTON.

Court for that purpose, contending that the act did not apply to promises made before the 1st of *January* 1829; there was no express provision to give it a retrospective effect; and without such a provision the Court would not sanction a construction which all the text writers on law had deprecated as productive of injustice.

Thus *Blackstone*, after reprobating the imperfect promulgation of laws, adds, "There is still a more unreasonable method than this, which is called making laws *ex post facto*." — "All law should be, therefore, made to commence *in futuro*," &c. 1 *Bl. Com.* 46. And it has been expressly laid down that a statute made in the affirmative, without any negative express or implied, does not take away the common law. 4 *Bac. Abr.* 641. Lord *Coke*, in commenting on the statute of *Gloucester*, 6 *Ed.* 1. *c.* 78. *s.* 3., at the words "if a man alien a tenement," says, "This extendeth to alienations made *after* the statute, and *not before*; for it is a rule of law of parliament that regularly *nova constitutio futuris formam imponere debet non præteritis*." 2 *Inst.* 292. And, according to him, "an act of parliament shall never be so construed as to do an injustice." 8 *Rep.* 136 *b.* (*a*) *Gilmore* v. *Shuter* (*b*) nearly resembles the present case. That was an action of *assumpsit* on a promise that in consideration plaintiff, at the request of *H. Shuter*, would marry the daughter of one *Harris*, *Shuter* agreed to give plaintiff in his lifetime, or leave him at his death, as much as *Harris* should give in portion with his daughter. Averment, that *Harris* gave in portion 2000*l.*, but that *Shuter* omitted to fulfil his promise. Plea, *non assumpsit*. The jury found, in a special verdict, that the promise was made in *February* 1676; that there was no *note* or *writing*; and that *Shuter* died in *August*

(*a*) *Sir Francis Barrington's* case. 2 *Show.* 17. 2 *Mod.* 310. 1 *Lev.* 227. 1 *Ventr.* 330.

(*b*) *Jones's Rep.* 108. S. C.

1677.

1829.

TOWLER v. CHATTERTON.

1677. The 29 *Car.* 2. passed in 1676; was read a third time in the House of Lords, *March* 7.; and by *s.* 4. provided, "That from and after the 24th of *June* 1677, no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, &c., unless the agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing, and signed by the party, or some other person thereunto by him lawfully authorised." The only question was, whether a promise made before the new act, but to be performed after, would maintain an action without note in writing? *Maynard* Serjt., for the Defendant, relied on the express words of the act, than which, he said, nothing could be plainer; and it was never heard that negative words in a statute *introductive*, should be interpreted against the express letter. *Pollexfen* for the Plaintiff. "The penning and words of the statute do plainly intend only promises after the 24th of *June*, and never designed a retrospect to avoid marriage agreements made and concluded at any time before. No act of parliament shall be intended to be made *against natural justice*, as it would be if this act should be taken literally, for then good and legal causes of action for debts and other things, upon promises made upon good and valuable consideration, would be destroyed and utterly taken away by the retrospect of the law, which nobody could divine would be made." And he referred to the Judges' opinions at *Serjeant's Inn*, in a case of a devise of land without three witnesses, made and published before the act, where testator died after the act, and yet it was held good; though it is no devise till after the testator's death. The title and style of the act was plain enough; that designed only a prospect for the future, for it was for the "prevention of frauds." The whole Court (except *Twisden*,

1829.

TOWLER v. CHATTERTON.

Twisden, who, being sick, was absent,) were of opinion that the action lay notwithstanding the act; and the justices agreed unanimously that the act did not extend to promises before the 24th of *June*, and judgment was given for the Plaintiff. They said that by an easy transposition of the words of the act, a construction agreeable to justice might be made, viz. where the words are, "after the 24th of *June*, no action shall be brought for a promise of marriage without note or writing," &c., the words so transposed, "no action shall be brought for any promise after the 24th of *June*," there is no retrospect or other injury to any one; and it is usual to make such transposition of words to make private contracts agree with the intention of the parties; as upon a lease dated 26th of *March* for years, rendering rent at the *Annunciation* and *Michaelmas*, during the term, the first rent shall be paid at *Michaelmas*. *A fortiori*, to make acts of parliament not repugnant to common justice.

In *Couch* q. t. v. *Jeffries* (*a*), in an action for a penalty for not paying the stamp-duty on an indenture of apprenticeship, after a verdict for Plaintiff, a motion was made to stay the judgment, on the ground that Defendant had since paid the duties under the 9 *G.* 3. *c.* 37. *s.* 4., which discharges the penalty on payment of the duties by *Sept.* 1. 1769. The action was brought and tried before the making of that act; and the question was, Whether the act should relate to actions commenced before the first day of the session in which it passed? There was no proviso to save actions already commenced, but Lord *Mansfield* said, "Here is a right vested; and it is not to be imagined that the legislature could, by general words, mean to take it away from the person in whom it was so legally vested, and who had

(*a*) 4 *Burr.* 2460.

been

1829.

TOWLER v. CHATTERTON.

been at a great deal of cost and charge in prosecuting. They certainly meant future actions." The rule was discharged. *Gilmore* v. *Shuter* was recognised in this case as an authority. In *Wilkinson* v. *Meyer* (*a*), an action of covenant on an indenture for the transfer of *South Sea* stock, the defendant having pleaded that the contract was not duly registered according to 7 *G.* 1. *stat.* 2. *s.* 8., which was passed subsequently to the date of the indenture, *Raymond* J. said, "that this act being *ex post facto*, the construction of the words ought not not to be strained, in order to defeat a contract, to the benefit whereof the party was well entitled at the time the contract was made," and judgment was given for the plaintiff.

The Court granted a rule *nisi*, against which

Adams Serjt. shewed cause. He relied on the express and unqualified language of the statute, and particularly on the clause by which its operation was postponed from the day on which it passed to the 1st of *January* 1829, apparently with the express intention of permitting the successful prosecution of actions actually commenced at the time the act passed.

Merewether was heard in support of his rule, and the cause stood over till this term.

The judgment of the Court was this day delivered as follows by

PARK J. This was an action brought for the agistment of cattle. The debt was, at the time of the action brought, of above six years' standing.

The evidence was, that the Defendant was at the house of the witness in *February* 1828, and said "I owe

(*a*) *Ld. Raym.* 1352.

your

1829.

TOWLER v. CHATTERTON.

your brother seven or eight pounds, and if I do he shall have it, I wish that nobody should lose any thing by me;" at another time Defendant said, "your brother *Ned* wants seven or eight pounds from me, we must settle it, nobody shall lose by me."

The action was not brought till *Hilary* term of the present year.

If this *verbal* promise was good, the promise was within six years, but more than six years since the cause of action first accrued had elapsed when the action was brought; and it was insisted, that the Plaintiff could not recover, for that, by the statute of 9 *G.* 4. *c.* 14., commonly called Lord *Tenterden*'s act, in cases of simple contract, no acknowledgement or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactment, (that is the statute of limitations,) or to deprive any party of the benefit thereof, unless *such acknowledgement or promise shall be made or contained by, or in some writing to be signed by the party chargeable thereby.*

On the other hand it was said, that, as the promise *by words* in this case was made before the operation of the new statute, the action was maintainable. Lord Chief Justice *Best* took the opinion of the jury, whether the words proved amounted to a promise to pay. They said they did. His Lordship then nonsuited the Plaintiff, on the ground that the promise should have been in *writing* according to the provisions of the new act, giving the Plaintiff leave to move to enter a verdict for the sum in proof, if this Court should differ from him.

But my Brothers *Burrough* and *Gaselee* think, and I agree with them, that this action, not having been brought till *Hilary* term 1829, and this act having begun to run from the 1st *January* in the present year, cannot be maintained upon a *verbal* promise.

Every

1829.

TOWLER v. CHATTERTON.

Every man who has attended a court of justice for some years, must have observed how very vaguely and loosely many of these verbal promises, which were to take a case, as it was called, *out* of the statute of limitations, were proved; and therefore it well became him, who introduced this act, to endeavour to provide a remedy for so great an evil.

The words of the enactment which I have read, had they stood alone, would probably have had immediate effect from the very day the bill passed, viz., the 9th of *May*. Nay, according to the old rule, which we all know prevailed some years ago, it would have had its operation from the first day of the session of parliament. But the noble mover of this act, in order to obviate what might by many be deemed a hardship, introduced a clause, (now the tenth section of the statute) declaring that this act should not take effect till the 1st of *January* following, thereby giving all persons in possession of such parol promises, seven months and more in which to bring their actions, founded on such promises, if they should be so minded.

If we were not to give the act this construction, it would follow that if a man obtained a *verbal* promise a day or two before the 1st of *January*, he would still have six years, at any time within which, he might bring his action.

The case of *Gilmour* v. *Shuter* was pressed upon the Court to shew that an act of parliament, viz. the statute of frauds should not have a retrospective operation.

But upon looking at that case, and the statute to which it refers, I do not think it can govern our present decision: because the statute now under review prevents all the mischief which the Judges in the case in *Jones* contemplated, by giving due notice that this law should have no operation till the 1st *January*, nearly eight months after its enactment.

But

1829.

TOWLER v. CHATTERTON.

But the present decision is not the first, nor the second that has been made upon this very statute, carrying it farther than the facts of this case require us to do at present.

The first I shall mention, though last in point of time, was the decision of a very profound lawyer,—a very strong and clear-headed man, my much valued and excellent friend, whose early and unexpected loss to the world in his judicial capacity, the whole profession and every good man must deeply deplore,—I mean the late Mr. Baron *Hullock*. At *Carlisle*, on the 5th *March* last, in a cause of *Kirkhaugh* v. *Herbert*, he nonsuited the plaintiff, though the action had been commenced *before* the first of *January*, because he had only a *parol* promise to take the case out of the statute.

But where can we look to a better authority on the subject, than to the noble Lord who framed the law, and brought it into parliament. Lord *Tenterden*, at the sittings after last *Hilary* term, at *Guildhall*, nonsuited the plaintiff, where the action had been commenced before the 1st of *January*, and a *parol* promise made before that day was offered in evidence to take the case out of the statute of limitations; his Lordship holding that the statute applied, and that the parol promise was insufficient.

In these two cases it will be observed, that the action was brought *before*, though not tried till *after* the statute had begun to operate; and, therefore, in that respect, they are stronger than the case at bar.

We are, therefore, of opinion that in this case the rule for setting aside the nonsuit must be discharged.

Rule discharged.

Nov. 20.

CLARKSON *v.* LAWSON.

Libel. Defendant published that Plaintiff, a proctor, had been suspended three times, *per quod* his neighbours were led to think he had been guilty of extortion. Plea, that he had been suspended once for extortion: Held ill.

THE declaration stated, that, whereas the Plaintiff at the time of the committing the several grievances by the Defendant, as thereinafter mentioned, had been and was and still is one of the proctors general exercent of the Arches Court of *Canterbury*, and other ecclesiastical and maritime courts in *Doctor's Commons*, and had, used, exercised, and carried on the profession and the business of a proctor with great credit and reputation, and had thereby acquired great gains, profits, and advantages, and as such proctor had always conducted himself with great honesty and integrity; yet the Defendant well knowing the premises, but greatly envying the happy state and condition of the Plaintiff, and contriving and wickedly and maliciously intending to injure the Plaintiff in his said good name, fame, and credit, and in his said profession or business, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this kingdom, and to vex, harass, oppress, impoverish, and wholly ruin him the Plaintiff, theretofore, to wit, on, &c. at, &c., falsely, wickedly, and maliciously did publish and cause and procure to be published of and concerning the Plaintiff, and of and concerning him in his said profession or business, a certain false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the Plaintiff, and of and concerning him in his said profession or business,

business, that is to say, — "With respect to the employment of proctors, it was strange that Mr. *Peddle*, who now changed his proctor, should have gone from Mr. *Toller* to Mr. *W. Geery* junior, (thereby meaning the said Plaintiff), who had been suspended three times, once by Lord *Stowell*, and twice by Sir *John Nicholl*; he was anxious to particularize his (thereby meaning the said Plaintiff's) name, in order to distinguish him from others who did not wish to be confounded with him:" and that the Defendant, further contriving and intending as aforesaid, theretofore, to wit, on, &c. at, &c. falsely, wickedly, and maliciously did publish a certain other false, scandalous, malicious, and defamatory libel of and concerning the Plaintiff, and of and concerning him in his said profession or business, in the form of and as a letter addressed to the editor of the *Times* newspaper, in which said letter was and is contained, amongst other things, the false, scandalous, defamatory, and libellous matter following, that is to say, — "Sir, Common justice will, I am satisfied, induce you to correct a misprint in your paper of this day in your report of Dr. *Lushington*'s speech upon the subject of the charge against Sir *John Nicholl*, in which you represent him as stating, that Mr. *W. Geery* junior was the proctor who had been thrice suspended from practice for extortion; that person, Sir, was *William Geering Clarkson*, (meaning the said Plaintiff), and not, Sir, your humble servant, *William Geery* junior:"

By means of the committing of which said several grievances by the Defendant as aforesaid, the Plaintiff had been greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this realm, in so much that divers of those neighbours, to whom the innocence and

1829.

CLAKKSON v. LAWSON.

integrity of the Plaintiff in the premises were unknown, had, on account of the committing of the said grievances by the Defendant as aforesaid, from thence hitherto suspected and believed, and still did suspect and believe the Plaintiff to have been and to be a person guilty of extortion, and had, by reason of the committing of the said grievances by the Defendant as aforesaid, from thence hitherto wholly refused and still did refuse to have any transaction, acquaintance, or discourse with the Plaintiff, as they were before used and accustomed to have, and otherwise would have had; and also by reason thereof the Plaintiff had been and was greatly prejudiced in his credit and reputation aforesaid, and had been greatly vexed, harassed, and oppressed and impoverished, and had also lost and been deprived of divers great gains or profits which would otherwise have arisen and accrued to him in his said profession or business, and had been and was otherwise much injured and damnified therein, to wit, at, &c.

The Defendant pleaded — as to the publishing the said several supposed libellous matters in the said declaration mentioned, *actio non*, because the Plaintiff before the said several times when, &c. in the said declaration mentioned, to wit, on, &c. had been employed in the way of his aforesaid profession and business of a proctor by one *Thomas Gillart*, and afterwards and before the said several times when, &c. to wit, on, &c. falsely, fraudulently, and extortionately demanded of and from the said *Thomas Gillart*, as and for the sum of money justly due to him the Plaintiff from the said *Thomas Gillart* for the work and labour of him the Plaintiff, as such proctor, done, performed, and bestowed in and about the business of the said *Thomas Gillart* in pursuance of the aforesaid employment, and for the fees and disbursements due and made to and by him, as such proctor, in respect

respect thereof, a certain large sum of money, to wit, the sum of 19*l.* 14*s.* 4*d.*, whereas in truth and in fact, the sum of money then and there justly due to him in that behalf, then and there amounted to a much less sum of money, to wit, the sum of 9*l.* 19*s.* 8*d.*; and the Defendant further said, that afterwards, and before the said several times when, &c. to wit, on, &c. Sir *J. Nicholl* Knight, then being Judge of the Prerogative Court of *Canterbury*, caused the aforesaid false, fraudulent, and extortionate demand to be taxed by the proper officers of the said court in that behalf, to wit, the Rev. *George Moore*, *Charles Moore* Esquire, and the Rev. *Robert Moore*, registrars of the said court, and that the said officers by their deputy in that behalf, did afterwards, and before the said several times when, &c. to wit, on, &c. report in the said court to the said Sir *J. Nicholl* as and being such Judge as aforesaid, according to the course and practice of the said court, that upon such taxation of the aforesaid false, fraudulent, and extortionate demand, a small part thereof, to wit, the sum of 9*l.* 19*s.* 8*d.* only had been found justly due to the Plaintiff from the said *Thomas Gillart*: and that thereupon, by reason of the premises afterwards and before the said several times when, &c. to wit, on, &c. the said Sir *John Nicholl*, as and being Judge of the said court, did order, direct, and adjudge to be suspended, and did suspend the Plaintiff from exercising the business of a proctor in the said court for and during the space of one year then next following, and did then and there direct, that at the expiration of the said space of one year, that the Plaintiff should be further suspended until he should appear and publicly make faithful promise to abstain from all malpractices in the future exercise of his business as a proctor in the said court; and that the said Sir *J. Nicholl* and Sir

1829.

CLARKSON v. LAWSON.

John Nicholl in the said supposed libel named, are one and the same person: whereupon the Defendant afterwards, at the said several times when, &c. did publish and cause and procure to be published the said supposed libellous matters in the said declaration mentioned, as he lawfully might for the cause aforesaid, which are the same publishing and causing and procuring to be published the said supposed libellous matters as are in the said declaration mentioned.

There was a second plea to the same effect.

Demurrer and joinder.

Cross Serjt. in support of the demurrer, objected that the pleas were bad, because they professed to furnish an answer to the whole of the charges set out in the declaration, but in effect answered only a part, nothing having been said as to the extortion, or the alleged suspension by Lord *Stowell*.

Wilde Serjt. in support of the pleas. The pleas must be viewed with reference to the declaration, and if they answer the sting and substance of the libel as pointed out by the declaration, are sufficient. Here the Plaintiff has alleged, as the consequence of the libel, that the public had suspected him to be a person guilty of extortion, and to have been on that account suspended from the exercise of his functions. In his own view of the case, therefore, the charge against him would have been supported if the Defendant had shewn that he had committed extortion, in the ordinary sense of the term, and had been suspended. Supposing him to have been once so decidedly fixed with the misconduct imputed, the discredit into which he must thereupon have fallen would not be materially aggravated by a knowledge that the offence had been repeated. In *Edwards* v. *Bell*

1829.

CLARKSON v. LAWSON.

Bell (*a*) the declaration charged the defendant with publishing the following libel against the plaintiff, a dissenting minister: — "A serious misunderstanding has recently taken place amongst the independent dissenters of *Great Marlow* and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter, against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously." The Defendant pleaded that the Plaintiff, whilst officiating as minister, published from a part of a chapel assigned to him as minister for the delivery of a sermon, to and in the presence of his congregation of and concerning one *M. F.*, a teacher of a certain *Sunday* school, the scandalous words following: — "I have something to say which I have thought of saying for some time, namely, the improper conduct of one of the female teachers; her name is Miss *Fair*; her conduct is a bad example and disgrace to the school; and if any of the children dare ask her to go home she shall be turned out of the school, and never enter it again: Miss *Fair* does more harm than good:" and thereby gave great offence to divers of the dissenters, to wit, one *A. B.*, and one *C. D.*, and occasioned serious misunderstanding amongst the dissenters. A verdict having been given for Defendant upon this plea, it was held, upon motion to enter a verdict for Plaintiff *non obstante veredicto*, that the plea was a sufficient answer to the libel charged, although it was objected that the libel alleged the misunderstanding to be among the independent dissenters and their pastor, and the plea justified only a misunderstanding occasioned among the dissenters. *Gifford* C. J. said, "It has been objected

(*a*) 1 *Bingh.* 403.

1829.
CLARKSON v. LAWSON.

that the libel alleges a misunderstanding to have arisen between the pastor and his congregation, while the justification alleges the misunderstanding to have existed only amongst the congregation; but even in that respect the plea substantially supports the statement contained in the libel, and the rule which has been obtained for the Plaintiff must be discharged." *Park* J. said, "As to the allegation touching the misunderstanding between the congregation and their pastor, the gist of it has been completely met in the language of the plea." And *Burrough* J. said, "No person can use the pulpit for the purpose of invective against individuals, and the Defendants were entitled to justify in this action, by shewing that what they had alleged against the Plaintiff in that respect, was borne out in fact. In such a case, it is sufficient if the substance of the libellous statement be justified; it is unnecessary to repeat every word which might have been the subject of the original comment. As much must be justified as meets the sting of the charge, and if any thing be contained in the charge which does not add to the sting of it, that need not be justified."

TINDAL C. J. The libel as set out in this declaration, alleges that the Plaintiff, being a proctor, was suspended from his office three times: twice by Sir *J. Nicholl*, and once by Lord *Stowell*. It also charges him with having been guilty of extortion. The plea begins by professing to be an answer to the whole declaration. "As to the said several supposed libellous matters in the said declaration mentioned, the said Plaintiff ought not to have or maintain his aforesaid action." It professes, therefore, to justify the allegation, that the Plaintiff had been suspended three times: but it justifies only to the extent of one of the suspensions, namely,

namely, that upon proof of an improper charge "Sir *John Nicholl*, as judge of the said Court, did order, direct, and adjudge, to be suspended, and did suspend the said Plaintiff from exercising the business of a proctor in the said Court, for and during the space of one year." Therefore, looking at the plea and the declaration, the plea seems to fall clearly within that class of cases, in which it has been held that a plea is bad if it profess to be an answer to the whole of a declaration, and answers only a part. It has been urged, indeed, that it is sufficient if the sting and substance of the libel be answered, and that the discredit attaching to a single suspension from office is not substantially aggravated by a repetition of similar reproof. I cannot but think, however, that if a party be believed to have committed three distinct offences, his character is much more deeply affected than if he has only been charged with the commission of one. The plea, therefore, does not justify the whole of the charge contained in the libel; and it falls within the rule of those decisions where it has been laid down, that a plea which professes to justify the whole, if in effect it justifies only a part, is bad: as in *Jones* v. *Gittings* (*a*), where the libel having charged the Plaintiff with having stolen cloth and velvet, a plea which justified the accusation only as to taking the velvet, was holden ill. The first plea here, after professing to answer the whole, omits two specific charges, and is therefore bad. The second plea falls within the same rule.

PARK J. The case of *Edwards* v. *Bell* is clearly distinguishable. If the preacher there had stated three specific facts in his discourse, and the justification had

(*a*) *Cro. Eliz.* 239. cited in *Craft* v. *Boite*, 1 *Wms. Saund.* 244 *a.* note.

gone

1829.

CLARKSON v. LAWSON.

gone to only one of them, the case might have been applicable to the present; but it has no bearing whatever, because the matter not touched on by the plea formed no part of the charge against the plaintiff.

I cannot agree in the position that the Plaintiff's character would not have fallen into lower discredit by the imputation of repeated offences than by the imputation of one only. A man who makes one slip, and is suspended, perhaps under the strict letter of some rule of court, but who is afterwards reinstated upon a proper submission and a promise of correct conduct for the future, cannot be said to stand on the same footing with one who has been suspended three times for repeated misconduct. The libel here states that the Plaintiff had been once suspended by Lord *Stowell* and twice by Sir *J. Nicholl*; but as far as appears by the plea, he was never suspended by Lord *Stowell*. The plea, therefore, is ill, having undertaken to justify the whole, and justifying only a part of the libel complained of.

BURROUGH J. It is a settled rule of law, that pleas are entire, and if bad in part are bad for the whole. The Defendant having professed to answer the whole declaration, and having answered only a part, his plea is bad altogether.

GASELEE J. The case is so clear that I was surprised to find it argued.

Judgment for the Plaintiff.

1829.

Nov. 20.

ASH and Wife and WATTS, Conusors; GYE, Conusee.

Fine permitted to pass as of a term twenty-two years previous, upon payment of the king's silver, all surviving parties interested consenting, upon its being shewn, that unknown to the parties, the clerk instructed to pass it had absconded with money intrusted to him for payment of the king's silver, when that payment alone was wanting to complete the fine.

BY a marriage settlement, bearing date in 1807, property belonging to Mrs. *Ash* and her sister *Lucy Watts*, two of the conusors, was settled on Mr. *Ash* for life, remainder to his children by Mrs. *Ash*, in such proportions as she and *Lucy Watts* should appoint pursuant to a power reserved in the deed of settlement; and a fine was levied as above to enure to the uses of the settlement. In *Trinity* term 1807, this fine proceeded as far as the *allocatur*, and the king's silver was compounded for; but before it was paid, the clerk of the solicitor who was concerned in the business, absconded, taking the money with him, and omitting to disclose to his employer that the fine had not passed, of which all parties remained ignorant till within a few days of this term, when the discovery was made accidentally.

Mrs. *Ash* and *Lucy Watts* made appointments in favour of Mrs. *Ash*'s children by Mr. *Ash*, pursuant to the powers contained in the deed of settlement, and shortly afterwards both died, *Lucy Watts* being unmarried.

Taddy Serjt., upon affidavits of these facts, and that all parties interested (including one of the children, who deposed that he was the heir of Mrs. *Ash* and of *Lucy Watts*,) were consenting to the application, now moved, that upon payment of the king's silver, this fine might pass as of *Trinity* term 1807; and he cited *Moule* v. *Eyles* (*a*),

(*a*) 1 *B. M.* 125.

and

1829.

The Fine of ASH and WATTS.

and *Vin. Abr. Fine*, (Q) 2. *pl.* 3. as authorities in favour of his application.

The Court took time to consider, and now said, that under the circumstances, they thought it reasonable the fine should pass as prayed.

Fiat.

Nov. 21.

KAY *v.* GROVES.

"I hereby agree to be answerable to *K.* for the amount of five sacks of flour, to be delivered to *T.*, payable in one month. *Nov.* 18. "*T. G.*" Held to be a guaranty for flour, not exceeding five sacks delivered at one time, and not a continuing guaranty for parcels delivered at various subsequent periods, though not exceeding in the whole five sacks.

ASSUMPSIT on the following guaranty:—

"I hereby agree to be answerable to Mr. *Kay* for the amount of five sacks of flour to be delivered to Mr. *W. Taylor*, *Gray's Inn Lane Road*, payable in one month.

"THOMAS GROVES.

"*November* 18, 1828."

At the trial before *Tindal* C. J., *Middlesex* sittings after *Trinity* term, it was proved, that on the 19th of *November* 1828, the Plaintiff delivered to *Taylor* five sacks of flour. On the 21st he delivered five more. On the 24th, *Taylor* sent back three and a half sacks out of the first five, as being of a bad quality, and three and a half other sacks were supplied that day.

For the first parcel *Taylor* gave a return-ticket to the Plaintiff's carman, as follows: —

"Received from Mr. *Kay*,

"On account of Mr. *Groves*,

"Five sacks whites.

"W. TAYLOR."

The

The return-ticket given for the second parcel was, —

" Received from *Symon's Wharf*,
" Five sacks flour (Balls)
" On account of Mr. *Kay*.
" W. TAYLOR."

The Defendant paid into court 3*l.* 17*s.*, the price of a sack and a half of flour, and called a witness, who stated that he and the Plaintiff had agreed to supply *Taylor* with five or ten sacks each.

The Chief Justice, observing that the Plaintiff had proved no second order from the Defendant, nor any agreement on his part that three and a half sacks should be substituted on the 24th *November* for three and a half sacks delivered on the 19th, and to be paid for within a month from that day, left it to the jury to determine, whether the delivery on the 24th was made under the Defendant's guaranty, and in substitution of any part of the delivery on the 19th; or, whether it was made under a new contract. The jury having found for the Defendant,

Jones, Serjt. obtained a rule *nisi* for a new trial, on the ground that the guaranty was a continuing guaranty at least to the extent of five sacks, and that the jury should have been directed to find for the Plaintiff to that extent.

Wilde Serjt., who shewed cause, contended, that the guaranty was for one delivery of five sacks, to be paid for in a month from the 19th of *November*, and that the case was properly left to the jury, there being no evidence to shew the Defendant had consented to extend his liability for five days more, by permitting a delivery on the 24th to be substituted for a delivery on the 19th. And it would be unreasonable to imply any such assent, after

1829.

KAY v. GROVES.

after an intervening delivery of another quantity of five sacks on the 21st, which clearly was unconnected with the guaranty.

Jones insisted, that the guaranty was not confined to any specific five sacks, but must be taken to extend to that amount, at whatever time, and in whatever manner delivered; as, if the amount had been delivered at many intervals, and by a bushel or a sack at a time, the guaranty bound the Defendant to pay for each sack or each bushel, (the whole quantity not exceeding five sacks,) at one month after the respective deliveries; and there being no evidence that the delivery of the 24th of *November* was under any new contract, while its corresponding in quantity with the number of sacks returned out of the delivery of the 19th shewed conclusively that it was in substitution for that delivery, the jury should have been directed to find for the Plaintiff.

TINDAL C. J. The only question is, whether my direction to the jury was right, and I do not see that the question could have been left to them in any other way. On the 19th *November*, five sacks were delivered to *Taylor* on account of the Defendant, at a month's credit. Two days afterwards, five other sacks were delivered to *Taylor*, so that he had then ten sacks; five, in respect of which the Defendant was liable, and five for which some other person was liable. A few days after this, three and a half sacks of the first lot were returned to the Plaintiff. The Defendant had then a right to say, although I am liable under my guaranty, I am only liable for what has actually been furnished, which is now, one sack and a half. The Plaintiff on the other hand, says, That though the Defendant's liability began to run from the 19th *November*, yet he is liable for any flour

flour sent afterwards, to any extent not exceeding five sacks in the whole.

I left it to the jury to say, whether the delivery on the 24th was under a new contract or not, and whether the whole quantity guaranteed had been furnished on the 19th. They have found that the delivery on the 24th was not under the guaranty, and that only one sack and a half was retained under the delivery of the 19th; and that finding appears to me to be warranted by the evidence.

PARK J. Even if the three sacks and a half had been returned before the delivery of the second parcel of five sacks, it would have been a question whether the Defendant could have been called on to pay for more than the sack and a half which were retained out of the delivery on the 19th; but the delivery of the second parcel of five sacks, under a different contract, before the delivery of the three sacks and a half, for which the Plaintiff now seeks to charge the Defendant, seems to remove all doubt. The Defendant's liability began to run from the 19th, and it could not be prolonged by a subsequent delivery without evidence of express assent on his part.

BURROUGH J. The stipulation for one month's credit decides the whole question. The case was properly left to the jury.

GASELEE J. If the delivery on the 24th was at a month's credit, it does not correspond with the guaranty, which was for a month's credit from the 19th. The Defendant might have had confidence in *Taylor*'s solvency for a month from that date; but if the Defendant had supposed that the Plaintiff, by subsequent deliveries,

1829.

KAY v. GROVES.

deliveries, could prolong the Defendant's responsibility, he might have declined to enter into any such engagement.

Rule discharged.

Nov. 22.

SHERWOOD *v.* TAYLER.

Defendant was arrested for 327*l.*; he tendered 250*l.*, but did not pay it into court. An arbitrator, to whom the cause was referred, awarded the Plaintiff only 250*l.*: Held, not a case to entitle Defendant to costs for a malicious and vexatious arrest.

JONES Serjt. obtained a rule calling on the Plaintiff to shew cause why the Defendant should not be allowed his costs under the 43 *G.* 3. *c.* 46., notwithstanding an award in favour of the Plaintiff, on the ground that the Defendant had been arrested without reasonable or probable cause.

The Plaintiff, a builder, sought to recover 327*l.* for building. The account was complicated, and the Defendant tendered 250*l.*, but did not pay it into court. The Plaintiff refusing to take that sum, proceeded to arrest the Defendant for 327*l.*, who deposited the money in the officer's hands. But an arbitrator, to whom the cause was referred, awarded the Plaintiff 250*l.* only.

Wilde Serjt., who shewed cause, contended, that the amount found to be due by the arbitrator was not sufficiently below the sum for which the Defendant was arrested, to justify the Court in concluding there was no reasonable and probable cause for the arrest.

The Defendant himself must have been doubtful as to the amount, or he would have paid the 250*l.* into court.

Jones.

1829.

SHERWOOD v. TAYLER.

Jones. According to the principle laid down in *Dronefield* v. *Archer* (*a*) there was no probable cause for the arrest after the Defendant had tendered a sum corresponding in amount with that which was found due by the arbitrator. In that case it was held, that where, in the account between Plaintiff and Defendant, there are items clearly due on both sides, it is an arrest without reasonable and probable cause within 43 *G.* 3. *c.* 46. *s.* 3.; if the Plaintiff arrests and holds the Defendant to bail for the amount due to him, without, at the same time, giving him credit for the items clearly due on the other side of the account. He ought only to hold the Defendant to bail for the admitted balance. The Plaintiff might have reasonable cause for proceeding with his action, but none for depriving the Defendant of his liberty; since the circumstance of the tender must have convinced him of the Defendant's ability to pay.

TINDAL C. J. This rule must be discharged. The statute 43 *G.* 3. directs that the Defendant shall be allowed his costs when he is arrested for a larger sum than is found to be due, provided it shall appear to the Court that there was not any reasonable or probable cause for such arrest. It has been contended, that if, under all the circumstances of the case, it was unreasonable in the Plaintiff to arrest the Defendant, the latter is entitled to his costs; but the construction which has been put on the statute is, that the Defendant is only entitled to them if the Plaintiff holds him to bail for a sum materially larger than that which is found to be due; and the labouring oar is thrown on the Defendant to shew that so much was not due. The object of the statute was to save the Defendant the expense and inconvenience of an action for a malicious arrest, and the

(*a*) 5 *B.* & *A.* 513.

1829.

SHERWOOD v. TAYLER.

proof offered on applications such as the present, must go to the same extent as the proof in such an action. Here, we do not see on the Defendant's affidavit that there was not reasonable and probable cause for his arrest. On the contrary, he admits by his tender, that 250*l.* was due, and he so far distrusted his own judgment as to the exact sum, that he abstained from paying into court the amount tendered. If the Defendant conceived he should not be safe in paying in 250*l.*, why should not the Plaintiff seek to recover more?

The argument, that the arrest was without probable cause, because the Defendant by his tender shewed himself solvent to a sufficient amount, proves too much. According to that, the statute would give every Defendant his costs where the Plaintiff arrested and recovered after a tender; but the recovery of costs by Defendants is confined to cases where the arrest is without probable cause.

PARK J. The act was kindly intended towards Defendants, but it has turned out to be a source of much vexation. I concur with the Chief Justice in his exposition of it, and I think it lies on the Defendant to shew that there was no reasonable or probable cause for the arrest.

BURROUGH J. concurring, the rule was

Discharged.

GASELEE J. was absent.

1829.

Sir JOHN TYRELL, Baronet, *v.* JOHN TYRELL JENNER, sued with the late Archbishop of CANTERBURY. *Nov.* 24.

QUARE impedit. The Defendant, *Jenner*, was a lunatic in confinement at *Hoxton*, in *Middlesex*; the church, of which the Plaintiff sought by this action to recover the presentation, was at *Midley*, in *Kent*.

On the 17th *July* 1828, he issued against the Defendant *Jenner*, a writ of summons returnable on the morrow of *All Souls* in that year, and, in *August*, sent a copy of this writ to the attorney of the Defendant *Jenner*'s committee.

The return to this writ was *nihil; non est inventus;* and *nulla ecclesia;* there being no church on the living.

The Plaintiff then issued into *Kent* against *Jenner* a writ of attachment, tested *November* 28th, 1828, and returnable on the morrow of the *Purification* (*February* 6th, 1829).

This writ of attachment recited that the Defendant *Jenner* had been summoned to appear on the morrow of *All Souls*. The return to it was *nihil* and *non est inventus*.

The Plaintiff next issued a *distringas* into *Kent*, ordering the sheriff to make a return of *nulla bona*, which was done accordingly.

He then issued into *Middlesex* a *testatum distringas*, tested 6th *May* 1829, and returnable in five weeks of *Easter* (27th *May*), by which the sheriff was required to distrain the Defendant by all his goods, lands, and chattels, and to keep them until a further writ issued,

The process in *quare impedit* is by summons, attachment, and great distress; therefore, where Plaintiff proceeded by summons, to which *nihil* was returned; then by attachment, which recited that the Defendant had been summoned; and then by *distringas*, under which the sheriff was ordered to levy 40*s.*; the proceedings were held to be irregular.

1829.

TYRELL v. JENNER.

and have his body; but this was accompanied with a direction to the sheriff to levy 40*s.* The sheriff returned to this, *distrinxi.*

On the 23d of *May* 1829, the Plaintiff's attorney gave notice to the attorney of the committee of the Defendant *Jenner*, that in default of the Defendant's appearing to the writ of *distringas* at the return thereof, the Plaintiff would cause an appearance to be entered for the Defendant. But on the 29th of *June* following, the Plaintiff's attorney gave notice to the attorney of the Defendant's committee, that in consequence of Defendant's not having appeared, judgment was entered up and a writ of enquiry about to issue.

Judgment having been entered up accordingly,

Wilde Serjt. obtained a rule *nisi* to set it aside as irregular; the Plaintiff not having proceeded by the great distress, nor having properly summoned the Defendant as he was bound to do under the statute of *Marlbridge*, 52 *Hen.* 3. *c.* 12. He cited *Searle* v. *Long* (*a*), where the Defendant had appeared once on the summons, and cast an *essoin*, but afterwards was neither summoned on the attachment or the great distress, but nominal summons had been returned on the process; and the Court set aside a judgment by default, on the ground that the process had not been executed as the statute intended.

Russell and *Stephen* Serjts. shewed cause. The process in *quare impedit*, is, according to all the books, by summons, attachment, and *distringas*; *Com. Dig. Pleader*, 3. I 1.; the Plaintiff has pursued it here with as much regularity as the nature of the circumstances admitted; and by stat. 52 *H.* 3. *c.* 12., if the Defendant

(*a*) 1 *Mod.* 248.

does

does not appear, nor cast an *essoin* on the first distress or before, there shall be judgment for the Plaintiff, and a writ to the bishop.

With respect to the summons, it is laid down in some of the books, that in *quare impedit* the summons may be served on the Defendant personally, or at the church door, 1 *Brownl.* 158. *Searle* v. *Long.*(*a*) But other authorities deny that there shall be any personal service.

Thus in *Vin. Abr.* tit. *Summons* (*A.*) it is said, "In *quare impedit* it shall not be to the person." So in 2 *Roll. Abr.* 486. (*Summons*), "*En quare impedit ne serra al person,*" and 11 *H.* 6. 4. is cited.

But here the return, *non est inventus*, is strictly true. The Defendant was constantly resident at *Hoxton* in *Middlesex*, and it would have been irregular to have served him there before a *testatum distringas* had been issued upon the *distringas* into *Kent.* In *Bloxam* v. *Surtees* (*b*) a *testatum* summons was mentioned, but Lord *Ellenborough* observed, that no instance was suggested of any such course of a *testatum* summons into another county, after an original summons in that in which the action was commenced. As to the case of *Searle* v. *Long* (*c*), it appears that, in that case, there were no real summoners, but the fictitious names of *John Doe* and *Richard Roe*, and the Defendant swore that he had not been summoned, and did not know any such persons as *John Doe* and *Richard Roe.* And there the Defendant *might* have been summoned. Here there are real summoners; and there being no church in the parish, the Plaintiff was excused from making proclamation at the church door.

In *Vin. Abr.* (*Summons*), *C.* 3. upon the stat. 31 *Eliz. c.* 3. *s.* 2., which, for the avoiding of secret summons in

(*a*) 2 *Mod.* 264.
(*b*) 4 *East*, 162.
(*c*) 1 *Mod.* 248. S. C. 2 *Mod.* 264.

1829.

TYRELL v. JENNER.

real actions, requires proclamation on a *Sunday* at the church door; it is said in the notes, "But if there be *no* church in the parish, the summons by the common law is sufficient; for it was not the intent to have summons at the church where there was *no* church; *Anders.* 278. *pl.* 286. is cited. Besides, the Defendant's committee's attorney having received notice of the summons so long ago as *August* 1828, it was now too late to come to the Court with technical objections.

Supposing the summons to have been sufficient, or objections to it waived under the circumstances, no appearance was necessary. By the statute, *52 Hen.* 3. *c.* 12. tit. *Days given in Dower, Assize of Darreine Presentment and Quare Impedit*, it is enacted, "And in a plea of *quare impedit*, if the disturber come not at the first day that he is summoned, nor cast an *essoin*, then he shall be attached for another day; at which day if he come not, nor cast an *essoin*, he shall be distrained by the great distress above given. And if he come not, then by his default a writ shall go to the bishop of the same place, that the claim of the disturber for that time shall not be prejudicial to the Plaintiff, saving to the disturber his right at another time when he will sue therefore." And Lord *Coke* in his reading upon this statute, expressly applies its operation to a case like the present. He says, "put the case, that upon the summons the defendant is returned *nihil*, and at the attachment and distress *nihil* also; this case is out of the *letter* of the statute, because the Defendant was never *summoned*, but it is said, that when there be two mischiefs at the common law, and the lesser is provided for by express words, the greater shall be included within the same remedy. And this case, where *nihil* is returned, is the greater mischief, for he (the Defendant) by his default shall lose nothing; but in the case provided, the Defendant by his default shall *lose issues*, and the law intends

intends that he will rather appear than lose issues." 2 *Inst.* 124. Therefore Lord *Coke* concludes that the statute applies to a case where *nihils* are returned; *i. e.* where *nihils* are properly returned according to the truth of the fact, as here, as well as to a case where the defendant has been summoned. And so in *Com. Dig.* (*Pleader*, 3. I. 1.; proceedings in *quare impedit*) where it is said, that by this statute of *Marlbridge*, if the defendant does not appear or cast an *essoin* on the first distress, or before, there shall be judgment for the plaintiff, and a writ to the bishop, though upon the summons or *pone* the defendant was not summoned, but *nihil* returned. The statute 7 & 8 *G.* 4. *c.* 71. *s.* 5. applies only to transitory actions: at all events it would be completely nugatory as applicable to an action like the present, as the Plaintiff is compelled to proceed in the county in which the church is situate, and will be stopped in his proceedings unless the Defendant has a dwelling-house or place of abode in that county. And upon a similar provision in a former statute, 51 *G.* 3. *c.* 124. (continued by 57 *G.* 3. *c.* 101.) a learned writer expresses an opinion that it did not operate to prevent the Plaintiff from issuing a *distringas*, and availing himself of the statute of *Marlbridge*. (*a*) The notice, therefore, given by the Plaintiff under 7 & 8 *G.* 4. *c.* 71. ought not to prejudice his case; it was unnecessary, and given in mistake.

Wilde and *Adams* Serjts. in support of the rule. Instead of ordering *nihil* to be returned upon the *distringas* into *Kent*, the Plaintiff should have taken the profits of the church under the great distress; and at all events the attachment into *Kent* was irregular in

(*a*) 1 *Rosc.* 155.

1829.

TYRELL v. JENNER.

reciting that the Defendant had been summoned, when *nihil* had been returned to the writ of summons.

Cur. adv. vult.

TINDAL C. J. This was a motion for setting aside a judgment which has been signed for the Plaintiff in *quare impedit*, upon the ground of irregularity; and the irregularity complained of is, that the Defendant was never served with the summons, and that no part of the subsequent process has been duly executed.

The process upon a *quare impedit* is given by the statute of *Marlbridge*, 52 *Hen.* 3. *c.* 12. in the terms following: — "And in a plea of *quare impedit*, if the disturber comes not at the first day that he is summoned, nor cast no *essoin*, then he shall be attached at another day; at which day if he come not nor cast no *essoin*, then he shall be distrained by the great distress above given; and if he come not then, by his default a writ shall go to the bishop of the same place, that the claim of the disturber for that time shall not be prejudicial to the Plaintiff," &c.

And the form of this writ of grand distress appears in the 2 *Inst.* 254. in Lord *Coke*'s reading on the statute of *Westminster* the first, where he observes somewhat quaintly, grand distress, *districtio magna*, is so called, not from the *quantity*, for it is very short, but for the quality, for the extent is very great, for thereby the sheriff is commanded "quod distringat tenementa, ita quod ipse, nec aliquis per ipsum, ad ea manum apponet, donec habuerit aliud præceptum, et quod de exitibus eorundem nobis respondeat et quod habeat corpus ejus," &c.

Whilst, therefore, the statute, by substituting the process by grand distress, and a peremptory judgment on default of appearance, instead of the ancient process of distress infinite, which only went to compel appearance,

pearance, but gave the Plaintiff no judgment, did on the one hand materially benefit the Plaintiff, "the distress infinite being mischievious," as Lord *Coke* says, "in respect of the lapse," it cannot but be seen, that it intended on the other hand to secure to the Defendant legal notice of the action, by the due execution of the substituted writ.

Even in personal actions, no judgment could be signed against the Defendant for default of appearance at common law. And the statute 12 *G.* 1. which enables the Plaintiff to appear for him, in order to proceed to judgment, expressly provides, that there shall first be an affidavit of the service of the process. If then such proof of notice was necessary in personal actions before a judgment by default was allowed, we may safely infer that the statute of *Marlbridge* contemplated an equal certainty of notice, and intended that the grand distress should be a writ actually executed according to its purport and directions.

And accordingly, in the case of *Searle* v. *Long*, where the defendant had appeared once on the summons and cast an *essoin*, but afterwards had neither been summoned on the attachment or the great distress, but nominal summonses had been returned on the process; the Court set aside a judgment by default, on the ground that the process had not been executed as the statute intended; observing, that the issue of that process is so fatal, that the right of the party is concluded by it, and that they ought not to suffer it to be changed to a thing of course.

Now, the process which has been sued out in the present case is a summons, an attachment, a process of grand distress into *Kent*, and a *testatum* grand distress into *Middlesex*.

The summons is returned *nihil*, and admitting, according to the doctrine cited from the 2 *Inst.* that an attach-

1829.

TYRELL v. JENNER.

attachment may nevertheless be grounded thereon, the attachment should at least make a true recital of the return of the summons: whereas, in this case, after the return of *nihil* has appeared upon the record, the attachment recites, that the Defendant had been summoned to appear on the morrow of *All Souls*.

This alone would be a sufficient irregularity in a process of this description to call upon us to set it aside.

The attachment is then returned *nihil*; and the grand distress, although it is sued in the usual form, is so far from being intended as any real proceeding, that the Plaintiff's attorney himself treats it as a mere matter of form, and by his direction the sheriff makes the return of *nulla bona* thereon; and the *testatum* by which the sheriff is required to distrain the Defendant by all his goods, lands, and chattels, and to keep them until a further writ issues, and to have his body, is thought to be satisfied by a return, that the sheriff has distrained him by issues merely nominal. Indeed the Plaintiff's attorney treats this second writ as merely formal, as he directs the sheriff to levy 40*s*. thereon.

We think, therefore, that the process of the Court has neither been regularly issued, nor properly executed; and, although the Defendant's legal advisers had knowledge of the proceedings, as they had in the case above referred to, yet they never had that legal notice which the statute of *Marlbridge* intended, when it substituted for the dilatory process of distress infinite, the speedy, and effectual process of the grand distress and final judgment in default of appearance; and for these reasons we think the rule should be made absolute.

Rule absolute.

1829.

WILMER *v.* WHITE.

Nov. 24.

An insolvent is not exonerated from damages unascertained at the time of his discharge, although the action in which they are sought to be recovered was commenced, and judgment by default suffered, prior to his first imprisonment.

JUDGMENT had been signed against the Defendant in *replevin*, for want of an avowry, and on the 28th of *April* last the Plaintiff's attorney delivered the Defendant a bill of costs of 28*l.* 7*s.* 8*d.* On the 29th the Defendant was committed to prison by another creditor, when he petitioned the Insolvent Debtors' Court for his discharge, and inserted in his schedule the Plaintiff as his creditor for 28*l.* 7*s.* 8*d.* of which the Plaintiff had due notice.

The Defendant was discharged under the insolvent debtors' act in *June*. But on the 10th of *October* the Plaintiff served him with notice of a writ of enquiry to assess the damages in this action; and on the 14th of *November* executed a writ of *fi. fa.* for those damages on the Defendant's goods, under which he took among other things the articles excepted by the insolvent debtors' act. Whereupon,

Merewether Serjt. obtained a rule *nisi* to set aside this execution as irregular, after the Defendant's discharge under the insolvent debtors' act.

Wilde Serjt. shewed cause.

The act discharges the insolvent only from debts due at the time of his first imprisonment, at which time the Defendant was liable to the Plaintiff, not for a debt, but for unliquidated damages, the amount of which could not be known, and, therefore, could not be specified in the schedule. With respect to the sort of claims from which the insolvent is to be discharged, the language

1829.

WILMER v. WHITE.

language of former acts has been nearly the same as the present; and it has always been holden that the insolvent is not discharged from a claim for unliquidated damages. In *Hilton* v. *Worrall* (*a*) it was held, that a debt depending upon a contingency at the time of a party's discharge under insolvent act 18 *G.* 3. *c.* 52. was not thereby discharged. In *Lloyd* v. *Neele* (*b*) it was holden, that discharge under the insolvent debtors' act 53 *G.* 3. *c.* 102. does not bar an action of trespass where the cause of action arose before the insolvent went to prison, and the damages were unliquidated before the discharge; and in *Lloyd* v. *Peell* (*c*) it was holden, that a plea of discharge under the insolvent debtors' act is no bar to an action of trespass for *mesne* profits, even though accruing before the discharge.

Merewether. The damages awarded to the Plaintiff in replevin are merely nominal, and the precise amount of the costs were ascertained by the admission of the Plaintiff's attorney before the Defendant went to prison. His schedule, therefore, contained a sufficiently precise statement of the Plaintiff's claim against him.

But the present insolvent debtors' act seems to include liabilities such as damages to be ascertained under a judgment: for though the word debt is used in the sixty-first section, yet the insolvent is to confess a judgment under which execution may be issued against his subsequently acquired property, till all claims against him be satisfied: this continuing process, which forms no part of the machinery of the former acts, indicates that it was the intention of the legislature to discharge the insolvent from any claim capable of being ascertained at the time of his discharge, and the cases

(*a*) 2 *Chitt.* 448. (*b*) *Id.* 222. (*c*) 3 *B.* & *A.* 407.

decided

decided under former acts have no application to the present.

TINDAL C. J. It appears to me that this rule must be discharged. It has been obtained under the sixty-first section of the last insolvent debtors' act, 7 *G.* 4. *c.* 57. The words of the section are, "That after any person shall have become entitled to the benefit of this act by any such adjudication as aforesaid, no writ of *fieri facias* or *elegit* shall issue on any judgment obtained against such prisoner, for any debt or sum of money, with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to this act." And the question is, Whether the Plaintiff's claim be a debt or sum of money, in respect of which an insolvent is entitled to the benefit of this act. Now the act is confined in terms to debts due from the insolvent at the time of his first imprisonment. But at that time no debt was due from this insolvent to the Plaintiff; a liability only existed to a claim for unascertained damages. There are no words in the act which can be applied to such a liability under a suit pending at the time of the insolvent's first imprisonment; on the contrary, he is required to insert in his schedule the precise sum due from him to his creditor; a thing impossible where the damages are unascertained.

Rule discharged.

1829.

Nov. 25.

DELAFIELD, Assignee of DAVID JONES, an Insolvent, *v.* FREEMAN. (*a*)

1. In an action by the assignee of an insolvent, it is not necessary to prove his petition to the Insolvent Debtor's Court, as part of the assignee's title.

2. The insolvent is an incompetent witness for the assignee, although he be willing to release the surplus of his effects.

CASE against the Defendant for so negligently and unskilfully preparing a lease, that the insolvent, *David Jones*, thereby failed to obtain property which he would have obtained if the lease had been properly prepared.

Plea, general issue.

At the trial before *Tindal* C. J., the Plaintiff gave in evidence the order of the Insolvent Debtors' Court, discharging the insolvent, together with certificated copies on parchment, under the seal of the Insolvent Debtors' Court, of the assignment to the provisional assignee, and of the assignment from the provisional assignee to the Plaintiff.

This was objected to as insufficient, on the ground, that the Insolvent Debtors' Court had jurisdiction only by the filing of the insolvent's petition, and that, therefore, at least the filing of such petition ought to be shewn.

The insolvent was then called, but was objected to as incompetent, although he offered to release his interest in the surplus of his effects. It was contended, that his future effects would be liable under the judgment entered up against him in the Insolvent Debtors' Court, and that, therefore, he had an interest in lowering the amount to be recovered under that judgment: whereupon he was rejected, and the Plaintiff was nonsuited.

Taddy Serjt. moved for a rule *nisi* to set aside this nonsuit, on the ground that the evidence put in was suffi-

(*a*) Communicated by a gentleman at the bar.

cient

1829.

DELAFIELD v. FREEMAN.

cient proof of the Plaintiff's title, and that the insolvent was a competent witness. With respect to the conveyance to the assignee, he relied on the language of the nineteenth section of 7 *G.* 4. *c.* 57., by which it is enacted, "That it shall and may be lawful for the said Court, at any time after the filing of the petition of any such prisoner as aforesaid, as to the said Court shall seem expedient, to appoint a proper person or persons, being a creditor or creditors of such prisoner, to be assignee or assignees of the estate and effects of such prisoner, for the purposes of this act; and when such assignee or assignees shall have signified to the said Court his or their acceptance of the said appointment, the estates, effects, rights, and powers of such prisoner, vested in such provisional assignee as aforesaid, shall immediately be conveyed and assigned by such provisional assignee to the said assignee or assignees, in trust for the benefit of such assignee or assignees, and the rest of the creditors of such prisoner, in respect of or in proportion to their respective debts, according to the provisions of this act; and after such conveyance and assignment by such provisional assignee, all the estate and effects of such prisoner shall be to all intents and purposes as effectually and legally vested by relation in such assignee or assignees, as if the said conveyance and assignment had been made by such prisoner to him and them: provided nevertheless, that no act done under or by virtue of such first conveyance and assignment, shall be thereby rendered void or defeated, but shall remain as valid as if no such relation had taken place: and that every such conveyance and assignment as aforesaid to such provisional assignee, and a counterpart of every such conveyance and assignment by such provisional assignee to such other assignee or assignees, shall be filed of record of the said Court; and a copy of any such record, made upon parchment, and purporting to have the

1829.

DELAFIELD v. FREEMAN.

the certificate of the provisional assignee of the said Court or his deputy, appointed for that purpose, indorsed thereon, and to be sealed with the seal of the said Court, shall be recognized and received as sufficient evidence of such conveyance and assignment, and of the title of the provisional and other assignee or assignees under the same, in all Courts, and before commissioners of bankrupts and justices of the peace, to all intents and purposes, without any proof whatever given of the same, or of any other proceeding in the said Court, in the matter of such prisoner's petition."

Even if it were necessary to shew the insolvent's petition, the recital of it in the conveyance was sufficient.

Then, the insolvent was a competent witness, because, if his estate paid all demands, the judgment would not affect him; if it did not, the sum recovered in this action would not render his situation worse, unless it were precisely the sum that turned the scale between paying all, or paying all minus the Plaintiff's demand, in which case that circumstance ought to be shewn by the party who objected to his competency.

The Court granted a rule *nisi* on the first ground, but refused it on the last.

Wilde and *Jones* Serjts. now shewed cause. The distinguishing difference between courts of general and courts of special or limited jurisdiction, is, that the jurisdiction of the latter must be shewn in order to lay a foundation for their interference, for they are without jurisdiction, unless they act strictly in pursuance of the authority assigned to them: *Brown* v. *Compton*. (*a*) Unless a petition be filed with a proper schedule by the insolvent, the Insolvent Debtors' Court has no autho-

(*a*) 8 *T. R.* 424.

rity

rity to order a conveyance; it is a condition precedent therefore, to any claim under such conveyance, that the previous steps be shewn to have been duly attended to: and though the language of the nineteenth section be very general, yet, it is plain from the seventy-sixth section, that the legislature contemplated the necessity of proving the previous steps in the matter, because by that section the officer of the Court is required, upon receiving a fee, to provide a copy of the petition and schedule, as well as of the order of the Court. The only object of the nineteenth section was to render unnecessary any proof of the assignment itself other than the seal of the Court.

The learned Serjeants then contended, that a failure by the insolvent to obtain property, occasioned by the negligence of the Defendant, could not be the subject of an action by the assignee of the insolvent, the act of *parliament* transferring to the assignee only the insolvent's property, and not his right to damages for a supposed tort. Upon this, however, the Court gave no opinion, as the Plaintiff's rule sought only to set aside the nonsuit, and, therefore, the argument on the point is omitted here.

TINDAL C. J. I have listened with great attention to the argument on the nineteenth section of the act, but have not been able to give it any other construction, than that it dispenses with all proof of the title and character of the assignee, beyond that which was given in this cause. If the clause had stopped at the words, "a copy of any such record" — "sealed with the seal of the said court, shall be recognized and received as sufficient evidence of such conveyance and assignment;" it might perhaps have been, as contended; but I do not know how we can reject the ensuing words, "without any proof whatever given of the same,

1829.

DELAFIELD v. FREEMAN.

or of any other proceeding in the said court, in the matter of such prisoner's petition." These words give a wider scope than the former, and if they had been brought to my attention at *nisi prius* I should have come to the same conclusion as I do now. As to the question, whether or not this action lies for the assignee, the cause is not ripe for that discussion, the present being a motion to set aside a nonsuit; we, therefore, abstain from expressing any opinion on the subject.

PARK J. I am of the same opinion. It is unnecessary to discuss whether or not the Insolvent Debtors' Court be a court of record, or a court of special or limited jurisdiction, because the words of the act are imperative on us, and give a complete proof of the assignees' title under the assignment; that is, of their title to sue; as the proof is expressly declared to be sufficient for all courts.

BURROUGH J. concurred.

GASELEE J. The seventy-sixth section does not appear to me at all to abate the force of the nineteenth. Many cases may arise as to the other proceedings in the Insolvent Debtors' Court, without calling into doubt the validity of the assignment.

Rule absolute.

1829.

WILLIAMSON *v.* HENLEY.

Nov. 26.

THE first count of the declaration stated, that theretofore and before the making of the promise and undertaking of the Defendant thereinafter next mentioned, a certain person, to wit, one *George Yeoman* had deposited in the hands of the Plaintiff a large sum of foreign money of great value, to wit, of the value of 42*l.* of lawful money of *Great Britain*, to wit, at *London*: that afterwards and before the making of the promise and undertaking of the Defendant thereinafter next mentioned, the Plaintiff, at the special instance and request of the Defendant, had delivered to him, the Defendant, the said sum of money of the said *George Yeoman*, to wit, at, &c.: that before the time of the making of the promise and undertaking of the Defendant thereinafter next mentioned, the said *George Yeoman* had threatened to commence an action at law against him the Plaintiff, for the recovery of the said sum of money, to wit, at *London* aforesaid; and thereupon afterwards, to wit, on, &c. at, &c. in consideration that the Plaintiff, at the special instance and request of the Defendant, would defend any action which the said *George Yeoman* should commence against him for or on account of the said sum of money, the Defendant undertook, and then and there faithfully promised the Plaintiff to save him harmless from the consequences of the said action, to wit, at, &c.: that the said *George Yeoman* afterwards and before the commencement of this suit,

Declaration, that Plaintiff, at the request of Defendant, and upon Defendant's undertaking to indemnify, defended an action for the recovery of money in which Defendant claimed an interest; that judgment was given against Plaintiff for 42*l.*; and that he was imprisoned, and paid the money under a *ca. sa.*:

Held, that he might recover against Defendant this sum under this count, upon proof of the judgment, without proof of the *capias*: or even on a count for money paid to Defendant's use; the Defendant having taken out a summons to be permitted to pay such sum in discharge of Plaintiff's demand.

Held, also, that the above special count did not disclose a contract void on account of maintenance.

1829.

WILLIAMSON v. HENLEY.

to wit, on, &c. at, &c. did bring, commence, and prosecute an action against him the said Plaintiff, in the Court of King's Bench at *Westminster*, for the recovery of the said sum of money, whereof the Defendant then and there had notice; and although the Plaintiff did, with the privity and consent of the Defendant, and to the best of his ability and power, defend the said action or suit, yet such proceedings were afterwards had in the said suit, to wit, at, &c. that the said *George Yeoman* afterwards and before the exhibiting the bill of the Plaintiff, to wit, in *Easter* term, in the ninth year of the reign of our lord the now king, in and by the consideration and judgment of the said Court, recovered and obtained against the Plaintiff, in the said Court in the aforesaid action, at the suit of him the said *George Yeoman*, damages to a large amount, to wit, the amount of 42*l.* 15*s.*, to wit, at, &c.: that afterwards, to wit, on, &c. a certain writ of our said lord the king, called a *capias ad satisfaciendum*, issued out of the said Court of King's Bench upon the said judgment, directed to the sheriffs of *London*, by which said writ our said lord the king commanded the said sheriffs that they should take the said Plaintiff if he should be found in their bailiwick, and him safely keep, so as that the said sheriffs might have his body before our lord the king at *Westminster* on *Friday* next after the morrow of the *Holy Trinity*, to satisfy the said *George Yeoman* the damage aforesaid in form aforesaid recovered; and that the said sheriffs should then have there that writ: that afterwards, to wit, on, &c. the Plaintiff was taken and arrested by his body under and by virtue of the said writ of *capias ad satisfaciendum*, at the suit of the said *George Yeoman*, and was kept and detained in custody and imprisoned at his suit, under and by virtue of the said writ, for a long space of time, to wit, from thence until the 6th day of *June*, in the year last aforesaid, when the

1829.

WILLIAMSON v. HENLEY.

the Plaintiff, in order to procure his discharge from the said imprisonment, was forced and obliged, and did necessarily expend divers large sums of money, to wit, the sum of 42*l.* 15*s.* so recovered by the said *George Yeoman* as aforesaid; and also the sum of 10*l.* for poundage and officers' fees and other expenses. And the Plaintiff was also, by means of the premises, put to other great charges and expenses of his monies, amounting to a large sum, to wit, to the sum of 50*l.*, and was imprisoned during all the time aforesaid, and thereby during all that time was prevented from following his necessary business and affairs, and lost, and was deprived of an opportunity of going upon a certain voyage, to wit, a voyage to the *West Indies* and back, and lost divers great gains which he might and otherwise would have made thereby, amounting to a large sum, to wit, the sum of 200*l.*, and was and is by means of the premises otherwise greatly damnified, &c.

There was another special count varying the statement of the same cause of action; a count for money paid, and the other common money counts. The Defendant pleaded the general issue. At the trial before *Tindal* C. J., *London* sittings after *Trinity* term, the Plaintiff proved the judgment in the actions of *Yeoman* v. *Williamson*, and called a sheriff's officer, who stated that he took the Plaintiff in execution at the suit of *George Yeoman*, on the 24th of *May* 1828, by virtue of a warrant directed to him in the cause of *Yeoman* v. *Williamson*, that the Plaintiff remained in custody till the 6th of *June*, when, in order to relieve himself, he paid 42*l.* 15*s.* and some costs. It was proved also, that after this action was commenced, the Defendant's attorney served a summons on the Plaintiff's attorney, to shew cause, "why, upon payment of 42*l.* 15*s.*, the debt for which this action is brought, together with costs to be

1829.

WILLIAMSON v. HENLEY.

taxed, all proceedings should not be staid:" that this summons was attended at a judge's chambers; and that, upon the Plaintiff's refusing to accept that sum as the whole of the debt due, the Judge declined making any order. No evidence was given of the writ of *capias* under which the Plaintiff was taken. But it was proved, that by the imprisonment he had lost the opportunity of accepting an eligible situation which had been offered to him. The jury gave a verdict of 42*l.* 15*s.* damages in respect of the money paid by the Plaintiff, and 29*l.* in respect of the injury sustained by him in consequence of the imprisonment.

Russell Serjt. moved for a rule *nisi* to set aside this verdict or to arrest the judgment, or to reduce the damages by 29*l.* The Plaintiff could not recover the 42*l.* 15*s.* under the first count, because in that count the money was alleged to have been paid under a writ of *capias*, of which writ no evidence was given. Nor could he recover it under the count for money paid. Upon such a count a Plaintiff can recover only sums paid by him, for which the Defendant would have been primarily liable; as where an underlessee, upon compulsion of distress, pays rent due from the lessee. But where money has been paid for a Defendant in pursuance of a special agreement into which he has entered, the party who makes the payment can only recover on the special agreement, and not on the common count: as where money has been paid on the faith of a guaranty. The principle is clearly laid down in *Cooke* v. *Munstone* (*a*), where the plaintiff having declared upon an agreement to deliver soil or breeze with a count for money had and received, proved that the defendant having agreed to deliver soil, he, the plaintiff, paid

(*a*) 1 *N. R.* 351.

2*l.* 5*s.*

2*l.* 5*s.* for earnest, but that the defendant refused to deliver the soil. It was holden that he could not recover damages for the non-delivery on the first count, on account of a variance; nor the 2*l.* 5*s.* upon the second, because the agreement was still in force. And this principle is illustrated by *Lightfoot* v. *Creed* (*a*), where the defendant contracted to transfer stock on a certain day to the plaintiff, but failed to perform his contract; upon which the plaintiff bought the stock, and, to recover the consequent loss sustained by him, brought an action against the defendant for money paid. It was holden, that such action was not maintainable, as the plaintiff should have declared specially on the contract. So in *Child* v. *Morley* (*b*), it was holden that a broker who contracted with others for the sale of stock at a future day by the authority of his principal, who afterwards refused to make good his bargain, could not, by paying the difference to such third persons, maintain an action on an implied *assumpsit* against his principal for the amount.

This was not money paid to the use of the Defendant, but money paid to discharge the Plaintiff from a liability he had incurred at the request of the Defendant, and which he could only recover under the Defendant's special undertaking.

Then, the first count discloses a contract illegal on the score of maintenance, so that the count is ill; and the verdict having been given generally on the whole declaration, the damages cannot be severed, and the judgment must be arrested.

At all events, the damages must be reduced by the amount of the 23*l.* awarded for the imprisonment under the *capias*, of which, without evidence of the *capias* set forth in the declaration, there was no legal proof.

A rule *nisi* having been granted,

(*a*) 8 *Taunt.* 268. (*b*) 8 *T. R.* 610.

1829.

WILLIAMSON v. HENLEY.

Wilde Serjt. shewed cause. The Defendant having taken out a summons to stay proceedings on payment to the Plaintiff of 42*l.* 15*s.* and costs, admitted thereby that the Plaintiff had paid that sum to the Defendant's use, so that an action for money paid well lay against him. But the sum might also be recovered on the first count of the declaration, for the gist of that count was, that the money had been paid in discharge of a judgment obtained by *Yeoman*, and the imprisonment under the *capias* was only matter of aggravation. There is no ground, therefore, for a nonsuit, or for arresting the judgment, as the damages have been distinctly severed, and the verdict may be reduced by 23*l.*, if the Court shall be of opinion that the imprisonment ought to have been proved by the production of the *capias*, in addition to evidence of actual capture and detention. The imprisonment, however, being a legal consequence of the judgment, was sufficiently established by the officer, who stated, that he actually apprehended the Plaintiff under a warrant directed to him in the cause of *Yeoman* v. *Williamson*.

The objection on the score of maintenance comes too late after verdict, if, indeed, it could be supported at all, for it must have been proved at the trial that the Defendant had a sufficient interest in the cause of *Yeoman* v. *Williamson* to justify the undertaking he gave to the Plaintiff. 1 *Wms. Saund.* 228. *n.* 1. [The Court appeared to think there was nothing in this objection.]

Russell was heard in support of his rule.

TINDAL C. J. I think the verdict ought to be reduced by 23*l.*, the amount given by the jury for the imprisonment of the Plaintiff; because, that imprisonment being alleged to have taken place under a *capias ad satisfaciendum*, the *capias* ought to have been proved.

But

1829.

WILLIAMSON v. HENLEY.

But I see no reason why the 42*l.* 15*s.* should not be recovered under the first count. That count contains two distinct allegations: 1st, a judgment under which 42*l.* 15*s.* was recovered against the Plaintiff in an action defended at the request of the Defendant; and, 2dly, a *capias* under which the Plaintiff was imprisoned. It was sufficient to entitle the Plaintiff to a verdict if he proved one of those allegations; especially, where, as in the present case, the damages were capable of being severed.

It is unnecessary, therefore, to say whether that sum could have been recovered under the count for money paid, although I have little doubt that it could, because the Plaintiff, by taking out the summons to be permitted to pay a certain sum in discharge of the claim against him, admitted that so much had been paid to his use.

The rule, therefore, must be discharged, except as to reducing the damages by 23*l.*

Rule discharged accordingly.

1829.

Nov. 26.

AFLALO *v.* FOURDRINIER and MOSES ALMOSNINOS.

Defendants, *A.* and *B.*, were sued on a bill of exchange accepted by them while in partnership. *B.* pleaded bankruptcy and certificate, and the Plaintiff entered a *nol. pros.* as to him.

Having released his surplus effects, Held, he was a competent witness for *A.*

THE Plaintiff sued the Defendants on a bill of exchange for 300*l.*, drawn by *Solomon* and *Moses Almosninos* on *Fourdrinier* and Co. the 4th *July* 1825, payable four months after date, accepted by *Fourdrinier* and Co., and indorsed by *S.* and *M. Almosninos* to the Plaintiff.

At the time the bill was drawn, *Moses Almosninos* was a partner in the firm of *Fourdrinier* and Co. as well as in the firm of *Almosninos*, and it was he who accepted the bill in question in the name of *Fourdrinier* and Co.

Before the action he had become a bankrupt, and upon his pleading his certificate in bar, the Plaintiff entered a *nolle prosequi* as to him, and proceeded against *Fourdrinier* alone.

At the trial before *Tindal* C. J., *London* sittings after *Trinity* term, the Defendant *Fourdrinier* called *Moses Almosninos* as a witness to shew the nature of this bill transaction, when, although he had released his interest in the surplus of his effects, his competency was objected to on the ground that he was interested in the result of the cause. His testimony, however, was admitted, subject to a motion on the point in the present term, and on that testimony the Defendant *Fourdrinier* had a verdict. Whereupon,

Spankie Serjt. moved for a new trial, on the ground that *Moses Almosninos* ought to have been excluded as an incompetent witness.

In

1829.

APLALO v. FOURDRINIER.

In *Moody* v. *King and Porter* (*a*) the Plaintiff, who had accepted, and paid for their accommodation, a bill drawn by the two Defendants, sued them for money lent; and a *nolle prosequi* having been entered as to *Porter*, who in the interval had become a bankrupt, he was permitted to be a witness for *King*, to prove that the bill had been accepted for the accommodation of him, *Porter*, alone; but this was permitted expressly on the ground, that they were not in partnership when the bill was drawn; that *King*, therefore, was only a surety for *Porter*, and as such might have proved under *Porter*'s bankruptcy.

Now here, *Fourdrinier* having been the general partner of *Moses Almosninos*, was a joint debtor on the acceptance, and not a mere surety, and could not have proved under a commission against his own partner for a debt incurred by them jointly. *Ex parte Taylor* (*b*), *Ex parte Heath* (*c*), *Ex parte Ellis.* (*d*) *Fourdrinier*'s claim against *Moses Almosninos*, therefore, for his share of the debt to be paid in this action, if not for the costs, would not have been barred by the certificate, and, consequently, the witness had an interest in defeating the action.

A rule *nisi* having been granted,

Wilde and *Russell* Serjts. shewed cause. They urged, that though *Fourdrinier* could not prove in competition with the creditors of the firm, he might prove the sum paid in this action against *Moses Almosninos*' separate estate; and even if it were otherwise, no action would lie for *Fourdrinier* against *Moses Almosninos*, for any portion of the sum to be recovered in this action. The Plaintiff having entered a *nolle prosequi* as to *Moses Almosninos*, he was no longer under any legal liability; and *Fourdrinier*, therefore, could never allege in an action for money

(*a*) 2 *B.* & *C.* 558.
(*b*) 2 *Rose*, 175.
(*c*) *Buck.* 455.
(*d*) 2 *Glynn* & *J.* 312.

paid,

1829.

AFLALO v. FOURDRINIER.

paid, that the money had been to the use or at the request of *Moses Almosninos*.

Spankie. If there were any weight in the last argument, it might have been adopted by all bankrupts who, previously to the 49 *G.* 3. *c.* 121., were called on, after pleading their certificate to a demand made by the principal debtor, to satisfy their surety for the sum paid by him; and yet, till the surety was enabled by the 49 *G.* 3. to prove his debt, the bankrupt was always holden liable to him: *Wright* v. *Hunter*. (*a*) The word partner would have been employed in the statute, if it had been intended that he should prove in the same way as a surety; and from the case of *Moody* v. *King*, it must be inferred the Court thought a partner could not prove.

Cur. adv. vult.

TINDAL C. J. The only question in this case is, whether *Fourdrinier*, upon payment of the whole debt, would be entitled to sue *Moses Almosninos*, his partner, for contribution, either in law or equity; for if *Fourdrinier* had this right, he could not call his partner as a witness, it being his direct interest to defeat the action. Before the statute 49 *G.* 3. *c.* 121. *s.* 8., it is clear that the solvent partner, who paid a partnership debt after the date of a commission of bankrupt issued against his partner, might recover the proportion of such debt by an action at law against the bankrupt, and that his certificate would be no bar to such an action. *Wright* v. *Hunter*. The only question is, Whether since that statute the solvent partner, after payment of the partnership debt, though subsequently to the commission, becomes entitled to prove? for if he can prove, he is

(*a*) 1 *East*, 20.

obliged

obliged to prove; the certificate will be a bar to any action for contribution; and the bankrupt partner is an admissible witness.

And upon consideration of that act, and of the cases decided thereon, we think *Fourdrinier*, after payment of this joint debt, would be allowed to prove the share paid by him for his bankrupt partner, and that the bankrupt, having obtained his certificate, and released his right to any surplus, was, consequently, an admissible witness for the Defendant.

The solvent partner, if not properly a surety for his partner's share, because each is originally liable for the whole, yet may, with strict propriety, be called as to the share belonging to his partner, a person liable for the debt of another; and in that character, would be entitled to prove under the commission.

And accordingly in *Ex parte Young* (*a*), Lord Chancellor *Eldon* held, that those words were adopted in the statute for the convenient latitude of comprehending all those who could not be strictly considered as sureties, but were responsible for another's debt; and allowed the solvent partner who had paid a debt after the commission, which the bankrupt partner had improperly contracted in the partnership name, to prove against the bankrupt partner's estate. Such proof, indeed, would not be allowed to come in competition with the claims of the partnership creditors: but if the debt can be proved at all, the certificate is a bar. And in 4 *Madd. Rep.* 477., the Vice Chancellor lays down the rule even more largely, by saying, "It is now settled that a solvent partner winding up the partnership concerns, is, under Sir *S. Romilly*'s act, to be considered as a surety paying the debt after the bankruptcy in respect of his previous liability. Each partner is a principal debtor for his own share, and they are mutually sureties

(*a*) 2 *Rose, B. C.* 40.

to

1829.

AYLALO v. FOURDRINIER.

to the creditors for the share of each other;" and the case of *Wood* v. *Dodson* (*a*) leads to the same conclusion. We think, therefore, the witness was properly admitted, and that the rule *nisi* for setting aside the verdict, and for a new trial, must be discharged.

Rule discharged.

(*a*) 2 *M. & S.* 195.

WHITE *v.* Trustees of the BRITISH Museum.

A will of lands subscribed by three witnesses, in the presence and at the request of the testator, is sufficiently attested within the statute of frauds, although none of the witnesses saw the testator's signature, and only one of them knew what the paper was.

THIS was a feigned issue upon the question, whether *William White*, deceased, did, by a certain paper writing, purporting to be his last will and testament, demise his freehold estates or not. And, upon the trial, the jury found a special verdict, setting out the paper-writing in question, and finding that the whole of the same, except the names of the witnesses, was in the handwriting of the said *W. White:* that the said *W. White* signed the said paper-writing before it was signed by the witnesses *John Hounslow*, *Mary Bristow*, and *Thomas Badcock*, or either of them: that he died on the 13th *May* 1823; that about five months before his death, he requested the said *John Hounslow* and *Mary Bristow* to sign their names to the said paper-writing, and they respectively, in pursuance of such request, did sign the same in the presence of the said *W. White*, but that they did not see the signature of the said *W. White* to the said paper-writing, and were not informed by the said *W. White*, when they so signed the said paper-writing, or at any other time, what was the nature thereof, or the purpose for which he requested them to sign the same: that, about three months before the death of the said *W. White*, he requested the said *Thomas Badcock*

1829.

WHITE v. Trustees of the BRITISH Museum.

Badcock to sign his name to the said paper-writing, which he immediately did in the presence of the said *W. White:* that at the time of signing the said paper-writing by the said *Thomas Badcock*, the said *W. White* informed him that the said paper-writing was his will. The special verdict then went on to state, that the paper-writing consisted of two sheets of paper produced to the jurors; that the two sheets were in the same room at the times of the respective signatures of the three persons above mentioned; and that *William White* was of sound and disposing mind and memory at the time he signed the paper, and also at the time the three other persons signed their names as aforesaid.

It appeared from the inspection of the instrument set out in the special verdict, that the signature of the three names could not possibly enure to charge themselves, or any other person, and could not have been done for any other purpose whatever than simply to make them witnesses to the will. And it appeared that, immediately above the names of the witnesses, there was written in the hand of the testator these words, "In the presence of us as witnesses thereto."

The case, after having been argued once, was sent down again for a more precise finding of the facts; and the foregoing special verdict having been found, was argued again in *Trinity* term last.

Wilde Serjt. The execution of this will is sufficiently in compliance with the requisitions of 29 *Car.* 2. *c.* 3. *s.* 5., which prescribes that such an instrument shall be in writing; signed by the party devising, or by some other person in his presence, and by his express directions; and attested and subscribed in the presence of the devisor, by three or four credible witnesses. On the two first heads the special verdict leaves no doubt. It is undeniable, also, that this will was subscribed by three

1829.

WHITE v. Trustees of the BRITISH Museum.

three witnesses, in the presence of the devisor, and the only question is, Whether the subscription of the witnesses, under such circumstances, be also attestation within the meaning of the statute? Now, it is not required by the statute that the witnesses should see the devisor sign, or that he should sign in their presence: *Grayson* v. *Atkinson* (*a*), *Ellis* v. *Smith* (*b*): nor that all the witnesses should subscribe in the presence of each other: *Jones* v. *Lake* (*c*): nor that they should know the instrument they have subscribed to be a will. [*Tindal* C. J. If the will be not actually signed by the devisor in the presence of the witnesses, must it not be acknowledged as such to them?] The devisor's desiring the witnesses to subscribe the instrument under the usual formulary of attestation, is a sufficient acknowledgment of his having signed it himself, and intending that the instrument should be effective. There is no other object for which he can be conceived to have required their subscription. Consistently, therefore, with the decisions before referred to, the word *attested*, as employed in the statute in conjunction with *subscribed*, can only mean that the witnesses should so subscribe as to be able at a future time to testify, by a reference to their subscription, the identity of the document subscribed. The object of the statute is, to prevent a false document from being substituted for that placed in their hands by the devisor. The safety of the devisor, and of the parties claiming under the devise, is sufficiently answered, if at any time the witnesses can testify that the document produced with their subscription is the same as that which the devisor has recognized by placing it in their hands for the purpose of obtaining their subscription. In *Peat* v. *Ougley* (*d*), at the top of the will was written,

(*a*) 2 *Ves.* 454.
(*b*) 1 *Ves.* jun. 11.
(*c*) 2 *Atk.* 176. n. See also 1 *Ves.* jun. 14.
(*d*) *Com. Rep.* 196.

ten — "signed, sealed, and published as my last will and testament, in the presence of, the same being written here for want of room below;" — this was likewise written by the testator's own hand; and then the names of the three witnesses were subscribed; two of those witnesses were dead, and the third was produced at the trial, who testified that he was servant to the testator, *Oliver* Earl of *Bolingbroke*, four years, and about twenty-seven or twenty-eight years ago, he and the other two witnesses were called up in the night and sent for into the earl's chamber, who produced a paper folded up, and desired him and the others to set their hands as witnesses to it, which they all three did in his presence, but they did not see any of the writing, nor did the earl tell them it was his will, or say what it was, but he believes this to be the paper, because his name is there, and the names of the other witnesses, and he never witnessed any other deed or paper for the earl. And though the earl did not set his name or seal to the will in their presence, yet he had often seen the earl write, and believed the whole will and codicil to be his handwriting.

Stonehouse v. *Evelyn* (*a*), *Bond* v. *Seawell* (*b*), *Wallis* v. *Wallis* (*c*), and *Trimmer* v. *Jackson* (*d*), were also referred to as authorities in support of the will.

Adams Serjt. *contrà*. The question is, Whether the word *attested* in the statute is satisfied by the simple signature of the witnesses; that is, signature unaccompanied with information or knowledge as to the nature of the instrument subscribed. The *subscription* required by the statute being satisfied by the witnesses writing their names, it must be presumed that the legislature had some object in requiring *attestation* as well

(*a*) 3 *P. Wms.* 252.
(*b*) 3 *Burr.* 1775.
(*c*) 4 *Burn's Eccl. Law*, 127.
(*d*) *Ib.*

1629.
WHITE
v.
Trustees of the BRITISH Museum.

as subscription; that object was, that the witnesses should know the paper they signed to be one which has the authority of the testator's signature. By no other means could the end of the statute, the prevention of fraud by the substitution of a false will, be prevented. For without such information, if the witnesses should sign two papers resembling each other, they might afterwards be unable to distinguish them. This is the principle which may be collected from all the cases. In *Grayson* v. *Atkinson* the Lord Chancellor, in giving judgment said, "It is insisted that the word *attested*, superadded to *subscribed*, imports they shall be witnesses of the very act and *factum* of signing, and that the testator's acknowledging that act to have been done by him, and that it is his handwriting, is not sufficient to enable them to attest: that is, it must be an attestation of the thing itself, not of the acknowledgment. To be sure, it must be an attestation of the thing in some sense; but the question upon this clause, as abstracted from the subsequent, is, if they attest *on the acknowledgment of the testator that it is his handwriting*, Whether that is not an attestation of the act, and whether not to be construed as agreeable to the rules of law and evidence, as all other attestation and signing might be proved? At the time of making that act of parliament, and ever since, if a bond or deed is executed by the person who signs it, — afterwards the witnesses are called in, — and before those witnesses he acknowledges that to be his hand, — that is always considered as an evidence of signing by the person executing, and is an attestation of it by them. It is true, there is some difference between the case of a deed and a will in this respect, because signing is not necessary to a deed, but *sealing* is; and I do not know it was ever held, that acknowledging his sealing without witnesses has been sufficient. But, notwithstanding, that is the rule of evidence relating to signing.

signing. If it was in the case of a note, or declaration of trust, or any other instrument not requiring the solemnities of a deed, but bare signing, if that instrument is attested by witnesses, proving that they were called in, *and that he took that instrument, and said, that was his hand, that would be a sufficient attestation of signing by him. That is the rule of evidence.* Considering the words of the act of parliament, it seems upon the penning of that clause, that *if the testator, having signed the will, did, before those witnesses, declare and acknowledge he had done so, and that was his hand, that might be sufficient within that clause:* for as to the subscribing, that makes no difference in the case; that further circumstance is required by the statute, to make it necessary that they should certify their attestation, all of them in the presence of the testator; therefore is subscription mentioned. Other guards are put by the statute on the execution of a will beside the subscription; as, that it is to be in writing. The testator must do some act materially declaring it to be his will, though no particular form of words is necessary. It is true, there are cases where an instrument sealed, and delivered, and subscribed by the testator has been held sufficient to make it a will; *but there must be some act or declaration importing this to be a solemn act by him to dispose of his estate.*" In *Wallis* v. *Wallis* (*a*) the testator said, "Take notice;" and then took a pen, and, in the presence of all the witnesses, signed and sealed each part of his will, and laid both the parts open and unfolded before them, to subscribe their names as witnesses thereto, which they all did by the direction of the said testator, in his presence and in the presence of each other, he shewing them severally where to write their names. *Westbeech* v. *Kennedy* (*b*), and the cases

(*a*) 4 *Burn's Eccl. Law*, 127. (*b*) 1 *Ves. & B.* 362.

 cited

1829.

WHITE v. Trustees of the BRITISH Museum.

cited in it, all establish the same principle. In all of them the testator either signed in the presence of the witnesses, or acknowledged the instrument to be his will. If this be not required, the word *attested* may be erased from the statute.

Here there was an acknowledgment to one of the witnesses; but to hold that sufficient, would be to repeal the statute, which requires that three shall attest; such acknowledgment, or what is tantamount to it, being an inseparable incident of attestation. Consistently with the statement of two of the witnesses in this case, the testator might have signed *after* he had obtained their subscription. In Chancery the depositions of all the three witnesses are required; and though in *Stonehouse* v. *Evelyn* it is said Mr. Justice *Fortescue Aland* laid it down, that it is sufficient if one of the three subscribing witnesses swears the testator acknowledged the signing to be his handwriting, yet that must be taken to apply to the practice of the circuit where he said he had ruled it, and where in the ordinary course only one of the three witnesses would be called to establish a *primâ facie* case.

Peat v. *Ougley* is an obscure case, but there the witness never signed any other paper, which was not the case with the present will.

Wilde. In *Ellis* v. *Smith*, Lord Chancellor *Hardwicke* said, "To the maxim of Lord *Bacon* I shall oppose one of Lord *Trevor*'s, that an established opinion is not to be receded from." Now it has been an established opinion that a will subscribed by three witnesses is well executed, although the testator omits to say that it has been signed by him. All that the statute means by subscription and attestation is, that the three witnesses should be able to speak to their own signature. Provided

vided a witness can do that, it would not invalidate an instrument, if he should say he had forgotten the circumstance of subscribing his name. If the witness can identify his handwriting, the security is as complete as if he could identify the instrument. Whatever may be established by acknowledgment may also be established by facts tantamount to acknowledgment; as a dumb man may acknowledge by signs: and the calling on witnesses to subscribe, is equivalent to an acknowledgment that the instrument to which they are required to set their names is genuine. As to the supposition that the testator might have signed after he called on the witnesses to do so, it is not to be presumed that he meditated a fraud against his own will. If this instrument had been a deed executed under a power expressed in the same terms as the statute, it would have been deemed a sufficient execution under the power. *Peat* v. *Cugley* is in point.

Cur. adv. vult.

The judgment of the Court was now delivered by

TINDAL C. J. (After stating the facts as *ante*), Upon this special verdict, the question is, Whether in the execution of this will, the several requisites contained in the statute of frauds have been duly observed? By the 29 *Car.* 2. *c.* 3. *s.* 5. it is enacted, "That all devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of non-effect." And as the special verdict finds that the whole of the paper writing is in the handwriting of *W. White*, and that he signed it before it was signed by the witnesses, the jurors do find in terms, that there is a devise

1829.

WHITE v. Trustees of the BRITISH Museum.

in writing. and that it is signed by the party who makes the devise.

Again, it is found expressly that the names of the three persons were signed by them upon the paper writing in the presence of the said *W. White*; that is, in the language of the statute, the writing was subscribed in the presence of the devisor. So that the enquiry is simplified and reduced to this single question, Whether the devise was attested by them within the meaning of the statute?

It has been held in so many cases that it must now be taken to be settled law, that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same; but that any acknowledgment before the witnesses that it is his signature, or any declaration before them that it is his will, is equivalent to an actual signature in their presence, and makes the attestation and subscription of the witnesses complete. The case of *Ellis* v. *Smith*, which was decided by Lord Chancellor *Hardwicke*, assisted by the Master of the Rolls Sir *J. Strange*, Lord Chief Justice *Willis*, and Lord Chief Baron *Parker*, all persons of high and eminent authority, is express to the latter point.

The objection, therefore, to the execution of the present will, does not rest upon the fact that it was not signed by *W. White* in their presence; but that with respect to two of the witnesses, *Hounslow* and *Bristow*, there was no acknowledgment of his signature, nor any declaration that it was his will; but that they signed their names in entire ignorance of the nature of the instrument, or of the object for which their names were written. And it is argued, that if such subscription of their names satisfies the intention of the statute the word attested will have no force whatever, and may be considered as if it had never been inserted.

The

1829.

WHITE v. Trustees of the BRITISH Museum.

The question, however, appears to us to be, Whether, upon this special verdict, the finding of the jury establishes, although not an acknowledgment in *words*, yet an acknowledgment in *fact*, by the devisor to the subscribing witnesses, that this instrument was his will? for if by what the devisor has done, he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, we think the attestation of the will must be considered as complete, and that this case falls within the principle and authority of that of *Ellis* v. *Smith*.

In the execution of wills, as well as that of deeds, the maxim will hold good "*non quod dictum sed quod factum est, inspicitur.*"

Now, in the first place, there is no doubt upon the identity of the instrument. The paper in question, is the very paper writing which was produced by the testator to the three witnesses. The great object of the direction of the statute, that witnesses shall subscribe in the presence of the devisor, was to prevent the possibility of the witnesses returning to his hands any other instrument than the very instrument which he delivered to them to attest. This object has been attained in the present case, and the identity of the instrument is beyond dispute.

In the next place, it appears from the special verdict, that the devisor was conscious himself that this instrument was his will. For the verdict finds that he was of sound and disposing mind, both at the time he signed it himself, and also at the time when the witnesses subscribed their names.

But further it appears from the inspection of the instrument set out in the special verdict, that the signature of the three names could not possibly enure to charge themselves, or any other person, and could not have been done for any other purpose whatever

1829.

WHITE v. Trustees of the BRITISH Museum.

than simply to make them witnesses to the will. And, lastly, it appears from the same inspection, that immediately above the names of the witnesses, there was written in the handwriting of the testator these words, "In the presence of us as witnesses thereto," which do amount to a clear and unequivocal indication of the testator's intention that they should be witnesses to his will.

When, therefore, we find the testator knew this instrument to be his will; that he produced it to the three persons and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge in fact, though not in words, to the three witnesses, that the will was his. For whatever might have been the doubt upon the true construction of the statute, if the case were *res integra*, yet as the law is now fully settled, that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of the signing; we think the facts of the present case place the testator and the witnesses in the same situation as they stood where such oral acknowledgment of signature has been made, and we do therefore, upon the principle of those decisions, hold the execution of the will in question to be good within the statute.

Judgment for Defendants.

1829.

TUCK and Others, Executors of GIBBONS, *v.* FYSON.

Nov. 26.

COVENANT. The declaration set out a lease of a dwelling-house bearing date *May* 17. 1823, between *Francis Gibbons* of the first part, *George Grain* of the second, and Defendant of the third, by which *Gibbons*, who had a term of thirty years in the premises, demised the house to *Grain* for nine years from *Lady-day* 1823, at a rent of 80*l.* a year, payable half-yearly:

And the said *George Grain* and the Defendant for themselves, jointly and severally, and for their and each of their joint and several heirs, executors, and administrators did by the said indenture covenant, promise, and agree to and with the said *Francis Gibbons*, his heirs and assigns, that they the said *George* and the Defendant, their executors or administrators, or some or one of them, should and would well and truly pay or cause to be paid unto the said *Francis*, his heirs and assigns, the said yearly rent or sum of 80*l.* thereinbefore reserved and made payable on the days and times thereinbefore limited and appointed for payment thereof, according to the true intent and meaning of the said indenture: and also should and would from time to time and at all times during the said term, at their or one of their proper costs and charges, well and sufficiently repair, uphold, support, maintain, glaze, and keep all and singular the said messuage or dwelling-house and premises thereby demised, and every part thereof, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, when and where, and as often as occasion should be or require, and at the end or other sooner determination

Where a lessee becomes bankrupt, a surety joined in the lease with him is liable to the lessor for breaches of covenant occurring between the date of the commission, and the delivery up of the lease by the lessee under 6 *G.* 4. *c.* 16. *s.* 75.

1829.

TUCK v. FYSON.

ation of the said demise should and would peaceably, and quietly leave, surrender, and yield up unto the said *Francis*, his heirs and assigns, the said messuage or dwelling-house and premises in good and substantial plight and condition. And the said Defendant did by the said indenture for himself, his heirs, executors, and administrators, further covenant, promise, and agree with and to the said *Francis*, his heirs and assigns, that he the said Defendant, his executors and administrators, should and would from time to time and at all times thereafter *save, defend, keep harmless, and indemnify the said* Francis, *his heirs and assigns*, of and from all loss, costs, charges, damages, and expenses which he the said *Francis*, his heirs and assigns, should or might sustain, expend, or be put unto for or by reason of the said *George*, his executors or administrators, not paying the rent, or not performing, fulfilling, and keeping all and singular the covenants, articles, and agreements therein reserved and contained on his or their parts and behalves to be observed, performed, fulfilled, and kept.

Averment of *Gibbon*'s death *November* 18. 1826, and of Plaintiffs' appointment to be executors.

Breach, that the said *George* and the Defendant had not, nor had either of them, paid the rent aforesaid for the two last half years of the said term elapsed on the 29th day of *September*, in the year 1827, or any part thereof; but the same was wholly in arrear and unpaid, contrary to the said covenant of the said defendant in that behalf: and that after the making of the said indenture, to wit, on the 18th day of *July*, in the year 1827, and from thenceforth until and at the commencement of that suit, to wit, at, &c. the said Defendant and the said *George* suffered and permitted the said messuage, or dwelling-house, and premises to be and continue, and the same were for and during all that time in every part thereof,

thereof, ruinous, prostrate, broken to pieces, fallen down, and in great decay for want of needful and necessary repairing, upholding, supporting, maintaining, and keeping the same, contrary to the said covenant of the said Defendant in that behalf; and that by reason of the said *George* not paying the said rent for the two last half-years of the said term, and suffering the said messuage, or dwelling-house, and premises, to be out of repair as aforesaid, the Plaintiffs had sustained and been put to loss and damage to a large amount, to wit, to the amount of 500*l.*, to wit, at, &c.; and the said Defendant had not saved, defended, and kept harmless, and indemnified the said Plaintiffs from such loss and damage; but had hitherto wholly neglected and refused so to do, contrary to his said covenant in that behalf.

To that declaration the Defendant pleaded, that the said *George Grain*, in the said indenture in the said declaration mentioned, before and at and after the making of the said indenture in the said declaration mentioned, and on the 26th day of *May*, in the year of our Lord 1827, and from thence continually until the suing out the commission of bankrupt thereinafter mentioned, was a hatter, and during all that time did use and exercise the trade of a hatter by way of bargaining, exchanging, bartering, and chevisance, and sought his trade of living by buying and selling, to wit, at, &c.; and the said *George Grain* so using and exercising the trade of a hatter, and seeking his trade of living as aforesaid, afterwards, to wit, on the 31st day of *May*, in the year of our Lord 1827 aforesaid, at, &c. became and was indebted to one *Edward Womersley*, a subject of this realm, in the sum of 80*l.* 11*s.* 6*d.* of lawful money of *Great Britain*, for a true and just debt due and owing from the said *George Grain* to the said *Edward Womersley*; and the said *George Grain* was then and there also indebted to one *James Knott*,

1829.

TUCK v. FYSON.

Knott, a subject of this realm, in a certain other large sum of money, to wit, the sum of 70*l.* 8*s.* 5*d.* of like lawful money, for a true and just debt due and owing from the said *George Grain* to the said *James Knott*; and the said *George Grain* was then and there also indebted to divers other persons in divers other large sums of money: and the said *George Grain* being so indebted as aforesaid, and being a subject of this realm, and so using and exercising the trade and business of a hatter, and seeking his trade of living as aforesaid, afterwards, and after making the said indenture in the said declaration mentioned, to wit, on the same day and year last aforesaid, at, &c. the said debts to the said *Edward Womersley* and the said *James Knott*, and also the said other debts being then and there due and unpaid and unsatisfied, became and was bankrupt within the true intent and meaning of the statute then and still in force concerning bankrupts made and provided; and that thereupon, afterwards, to wit, on the 25th day of *June*, in the year of our Lord 1827 aforesaid, at, &c. a certain commission of bankruptcy under the Great Seal of the United Kingdom of *Great Britain* and *Ireland*, bearing date at *Westminster* a certain day and year, to wit, the same day and year last aforesaid, grounded upon the said statute, upon the petition of the said *Edward Womersley* and *James Knott*, was duly awarded and issued against the said *George Grain*, directed to certain commissioners therein named; (the commission was here set out), by virtue of which said commission, and by force of the said statute concerning bankrupts, the major part of the said commissioners named in the said commission having severally and respectively duly taken the oath prescribed and appointed to be taken by commissioners of bankrupts according to the form of the statute in that case made and provided, and having then and there entered and kept

kept a memorandum thereof among the proceedings in the said commission, afterwards, to wit, on the 2d day of *July*, in the year of our Lord 1827 aforesaid, at, &c., did in due form of law, find that the said *George Grain* had become bankrupt within the true intent and meaning of the statute made and then in force concerning bankrupts before the date and issuing forth of the said commission, and did then and there declare and adjudge him bankrupt accordingly: that at the time the said *George Grain* became and was bankrupt as aforesaid, he the said *George Grain* was entitled to the said lease in the said declaration mentioned, to wit, at, &c., and that the said rent in the said declaration mentioned, and every part thereof (if any such be in arrear) became due and was in arrear and accrued, and also that the committing the said supposed breaches of covenant in the said declaration assigned (if any such there be,) was committed and made after the date of the said commission, to wit, on the 1st day of *July*, in the year of our Lord 1827, to wit, at, &c.: that after the said *George Grain* became and was bankrupt as aforesaid, to wit, on the 21st day of *July*, in the year of our Lord 1827, at, &c. in the parish and ward aforesaid, *Elliot Taylor* and *Edward Womersley*, being then and there the assignees duly appointed of the estate and effects of the said *George Grain* as such bankrupt as aforesaid, declined the said lease; of which the said *George Grain*, so being such bankrupt as aforesaid, afterwards, to wit, on the day and year last aforesaid, at, &c. had notice, and thereupon the said *George Grain* being such bankrupt as aforesaid, afterwards, and after the death of the said *Francis Gibbons*, to wit, on the said day and year last aforesaid, at, &c. and within fourteen days next after he, the said *George Grain*, being such bankrupt, had notice that the said assignees had declined the said lease as aforesaid, delivered up such lease to the said Plaintiffs

1829.

TUCK v. FYSON.

as executors as aforesaid, to wit, at, &c. And this the said Defendant was ready to verify.

There was a second plea setting forth the same defence more concisely. The Plaintiffs replied,

That, by reason of any thing in those pleas alleged, they ought not to be barred from having and maintaining their aforesaid action thereof against the said Defendant, because the delivering up of the said lease in the said first plea mentioned, was after the said 21st day of *July* in the year 1827 aforesaid, and after the said several breaches of covenant and every of them had accrued. And this they were ready to verify. Wherefore, &c.

Demurrer and joinder.

Wilde Serjt. in support of the demurrer. The Defendant is not liable in respect of the breaches of covenant assigned, at all events, not upon this contract. By 6 *G.* 4. *c.* 16. *s.* 75. it is enacted, "That any bankrupt entitled to any lease, or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained: and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid; and if the assignees shall not (upon being thereto required), elect whether they will accept or decline such lease or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing shall be entitled to apply by petition to the Lord Chancellor, who may order them so to elect,

elect, and deliver up such lease or agreement in case they shall decline the same, and the possession of the premises, or may make such other order therein as he shall think fit."

It is plain that the object of the legislature was, to discharge the bankrupt at all events. Therefore, in *Doe* v. *Smith* (*a*), where a lessee covenanted not to assign, and became bankrupt, and his assignees took to the lease, his covenant was holden to be absolutely discharged by 49 *G.* 3. *c.* 121. *s.* 19., and that, therefore, if he came in again as assignee of his assignees, he should not be charged with that covenant, and it was no breach if he assigned.

Now the bankrupt would not be absolutely discharged if circuitously responsible through a demand made on his surety. But the delivery up of the lease operates as a surrender and extinguishment of the term by relation, from the date of the commission. It never could have been intended that the lessee should be discharged, and the lessor remain bound by the grant; no one who claimed under it could have any longer a right to enter; and without a power of entry how could he be in a condition to perform covenants? How could he in case of dispute shew any title to the term? It is possible the legislature might not have contemplated the case of a lease with a surety bound by the same instrument; but the instrument must receive the same construction, and be subject to the same incidents, whoever be the party sued. If then the principal lessee be by his bankruptcy discharged from rent accruing after the date of his commission, and if the term be extinguished by the delivery up of the lease, it must be extinguished by relation from the date of the commission, since from that period the lessee is declared to be discharged from all his covenants. It is

(*a*) 5 *Taunt.* 800.

not

1829.

TUCK v. FYSON.

not contended that a surety for a tenant might not, by some separate instrument, — by a contract in a different form, — be rendered liable in case of the bankruptcy of the tenant; but the Defendant being a party to the present lease, and chargeable only in respect of that instrument, his liability cannot be more than co-extensive with it, and the instrument being extinguished by the commission, his liability ceases from the moment of its extinguishment.

Stephen Serjt. *contrà*. This case has been virtually decided by *Inglis* v. *M'Dougal*. (*a*) It was there holden, that if a surety enter into a bond with a principal conditioned for the performance of covenants contained in an agreement for a lease, such surety is still liable, although the principal become bankrupt, and be discharged under the 49 *G*. 3. *c*. 121. *s*. 19.

The language of that section is in spirit and almost in words the same as that of the seventy-fifth section of 6 *G*. 4. *c*. 16. The discharge of the lessee does not necessarily imply the discharge of his surety, but rather the reverse; for the very object of taking the surety is to secure the landlord against the failure of the lessee; and the argument that the lessee would not be absolutely discharged unless the surety were equally discharged also, was as applicable in *Inglis* v. *M'Dougal* as in the present case. With regard to the supposed extinguishment of the term by the delivering up the lease, that delivery was required only for the protection of the lessor and lessee, and the statute did not look to the rights of others; but, whether the term be extinguished or not, the lessor is entitled to an indemnity at the hands of the surety if no rent be obtained; and to no more than an indemnity; so that if he were paid by the produce of the land, the surety would not be called on. It is only on the supposition that

(*a*) 1 *B*. *M*. 196.

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1829.

TUCK v. FYSON.

the legislature intended to discharge the surety, that the argument of an extinguishment of the term by relation to the date of the commission, can be supported at all; and *Inglis* v. *M'Dougal* has decided that the legislature had no such intention. Admitting even that the term is extinguished by delivery of the lease, there is no ground for contending that it is extinguished retrospectively. It is alleged on this record, and admitted by the demurrer, that damage had accrued, in respect of covenants broken, on the 18th *July* 1827: it is not alleged that the assignees had declined to accept the term previously to *July* 21. 1827; and till they make their election, the effect of the assignment is suspended, and the term vests in the bankrupt: *Copeland* v. *Stevens*: (*a*) so that, at all events, the defendant is liable till the delivery of the lease within fourteen days subsequently to *July* 21.

As far as respects the annually-accruing payments, a surety in an annuity-deed is much in the same situation as a surety in a lease; and in *Welsh* v. *Welsh* (*b*) it was expressly holden, that in the case of an annuity the surety was not discharged by the bankruptcy and certificate of his principal.

Wilde. Whether the legislature intended to discharge the surety or not, he is at all events discharged by the form of the contract into which he has entered in this case; for the contract being at an end by the delivering up of the lease, so also is his responsibility. And this distinguishes the case from *Inglis* v. *M'Dougall*, where the responsibility of the surety arose under a separate instrument, a bond, which was not affected by the bankruptcy of the principal. In that case, too, it could not be affirmed that the lease was determined, for there was no lease in existence. Here the lease was

(*a*) 1 *B. & A.* 593. (*b*) 4 *M. & S.* 333.

1289.

TUCK v. PYSON.

determined, and determined by relation from the date of the commission: for from that date might the lessor have recovered the *mesne profits*, had he been driven to resort to an ejectment.

Cur. adv. vult.

TINDAL C. J. The question in this case is, Whether a surety for a lessee is liable in respect of breaches of covenant which accrued after the date of a commission of bankruptcy against the lessee, but before the delivery up of the lease by the bankrupt to the lessor under the provision of the bankrupt act 6 *G.* 4. *c.* 16. *s.* 75.?

That section contemplates and provides for three cases: first, where the assignees accept the lease; in which case, it declares that the bankrupt shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any non-observance or non-performance of the covenants: secondly, where the assignees decline the same; in which case it declares that the bankrupt shall not be liable as aforesaid, in case he deliver up such lease to the lessor within fourteen days after he shall have had notice that the assignees shall have declined to accept the lease: and, lastly, where the assignees do not, upon request, elect whether they will accept or decline; in which case the Lord Chancellor has power, upon petition, to order the assignees to elect, and to deliver up the lease and possession of the premises if they decline the same.

The present case falls within the second of the provisions contained in the section above referred to; and it may be admitted, that under the circumstances stated in the pleadings, and confessed by the demurrer, the bankrupt himself would not be liable to be sued now for the non-payment of the rent, or non-observance of the covenant to repair stated in the declaration, inasmuch as those breaches accrued subsequently to the date of the commission. But the question still arises, whether the words

words of the statute give any more than a personal discharge to the bankrupt, and whether the surety is not still liable, inasmuch as the breaches were incurred prior to the actual delivery up of the lease to the lessor.

It is contended on the part of the Defendant, that when the lessee has delivered up the lease within the time prescribed by the statute, it operates as a surrender of the lease from the date of the commission; so that the term and interest of the lease must be considered to have ceased from that time, and consequently that the surety cannot be held liable for any breaches after the commission, the same being breaches after the term has ceased.

We think, however, the doctrine of a surrender by relation cannot be supported by any legal analogy, or by the proper construction of the statute.

It is well settled by the case of *Copeland* v. *Stevens*, that where the assignees do nothing to shew their acceptance of a lease for years, the effect of the assignment is suspended, and the term vests in the bankrupt until they make their election. The term, therefore, having once vested in the bankrupt, must remain vested in him, until either the assignees elect to take it, or until he himself delivers it up under the provision of this section; for if it could be deemed to have been devested or extinguished from the date of the commission, it would follow that the bankrupt, if he had been in possession during the interval, would have been so without any title from the time of the commission.

And as to the statute, it contains no words of avoidance of the lease from any antecedent time: it only declares that in case the lessee delivers up the lease, he shall not be liable for the breach of covenants incurred after the date of the commission; and these words appear to us to import no more than a personal discharge to the lessee from his liability under the covenants, by the

1829.

TUCK v. FYSON.

performance of a condition subsequent. Inasmuch, however, as the liability of the surety was running at the same time, and there is nothing in the act to extend the defeasance to his case, we think it still continues until the actual delivery of the lease under the statute to the lessor.

In the case of *Inglis* v. *M'Dougall* the surety was held not to be discharged where the assignee had accepted the lease as part of the bankrupt's estate, though the stat. 49 *G.* 3. uses words exactly similar to those in question, viz. "that the bankrupt shall not be liable to pay any rent accruing after such acceptance." And we see no reason to doubt the propriety of that construction, or to place any other upon the words of this act. Upon the whole, therefore, we think judgment should be for the Plaintiff.

Judgment for the Plaintiff.

Nov. 23.

FIELDER *v.* RAY.

After the Plaintiff has proved, by witnesses, a case of implied or oral contract, he cannot be nonsuited by the Defendant's producing an unstamped written instrument, purporting to contain the terms of the contract.

THE Defendant had engaged with one *Aldrich*, that *Aldrich* should print certain quantities of calico.

Shortly after the commencement of the process *Aldrich* assigned his business and factory to the Plaintiff, who proceeded with and completed the work, the value of which he sought to recover in this action. At the trial before *Tindal* C. J. the delivery of the goods was proved, and that a great part of the work was done after the Plaintiff had succeeded to the premises.

The Defendant insisted that his contract was with *Aldrich*; that he had never retained the Plaintiff; to whom, in any event, he could not be liable for more than the portion of work done by him subsequently to the

1829.

FIELDER v. RAY.

the assignment by *Aldrich*; and further, that he had refused to allow the work to be proceeded with by the Plaintiff till he had signed a written agreement containing terms different from those which the Plaintiff now sought to enforce. This agreement was produced, but not being stamped, it was objected, on the part of the Plaintiff, that it could not be read, and the learned Chief Justice being of that opinion, a verdict was found for the Plaintiff.

Wilde Serjt. obtained a rule *nisi* to set aside this verdict and enter a nonsuit, on two grounds: first, that without the writing there was no evidence to go to the jury of any contract between the Plaintiff and Defendant; secondly, that as it appeared the agreement between the parties had been reduced to writing, the Plaintiff ought to be nonsuited for not producing it.

Taddy Serjt., who shewed cause, argued, that after the Plaintiff had established his case without any suggestion of a written agreement having been made, if the Defendant relied on a written agreement he must first put in and prove it; and that having failed to do so, he could not say that the Plaintiff had failed in establishing his case, since if the writing had actually been produced, it might turn out not to affect the contract on which the action was brought. He relied on the language of *Littledale* J. in *Reed* v. *Deere* (*a*), "If, indeed, a plaintiff get through his case without giving the defendant any opportunity of mentioning the written agreement, the latter must produce it, and he cannot avail himself of it unless it be duly stamped;" and on *Rex* v. *Inhabitants of Rawden* (*b*), where, upon the trial of an appeal, the appellants having proved that the pauper occupied a tenement of 10*l.* per annum, and paid rent and taxes for the same, the respondents, in order to

(*a*) 7 *B.* & *C.* 266. (*b*) 8 *B.* & *C.* 708.

1829.

FIELDER v. RAY.

shew that the pauper was not the sole tenant, attempted to prove by parol that the premises were let to the pauper and two other persons; but the witness, in cross-examination, having stated that the letting was by a written instrument, the Court held that it could be proved only by the production of that instrument.

Wilde. The evidence on which the Plaintiff launched his case not having been the best that could have been produced, ought not to avail him. If he had proved his case by a witness who afterwards had been shewn to be interested, the whole of his testimony would have been struck out. In *Reed* v. *Deere* the objection was not urged in the present form. There a party declared upon two written agreements, by the second of which variations were made in the first; and there were also counts upon each separately; it appeared when the instruments were produced in evidence by the plaintiff, that the first only was stamped; and it was held that the second could not be read in evidence to support the plaintiff's case, but might be looked at in order to ascertain whether the first was altered by it, and that, therefore, the plaintiff could not exclude the second agreement, and proceed upon the counts, setting out the first only. And *Rex* v. *Inhabitants of Rawden* was a decision upon a parish appeal, where the case of the respondents was distinct from the case of the appellants, the respondents relying upon a different contract. But *Vincent* v. *Cole* (*a*) sustains the present objection. If it appear that the contract upon which both parties are proceeding is evidenced in writing, it makes no difference whether that be shewn in an early or late stage of the cause.

TINDAL C. J. The rule for a new trial on the ground that there was no evidence of a contract to go to the

(*a*) 3 *Carr. & P.* 481.

jury

jury must be discharged. Considering that a great part of the work was done after the Plaintiff was in possession of the premises assigned by *Aldrich*, and that the Defendant received the goods, there was at least *some* evidence of a contract to go to the jury. But it has also been urged that a written document which was tendered in evidence on the part of the Defendant, and rejected for want of a stamp, ought to have been received, at least for the purpose of nonsuiting the Plaintiff, on the ground that he had established by testimony a contract of which there was evidence in writing.

1829.
FIELDER v. RAY.

I think, however, that it was incumbent on the Defendant in that stage of the cause to prove the existence of the agreement, by producing it in a form in which it could be received, that is, properly stamped. It has been argued, that if it be shewn that a contract is evidenced by writing, it is immaterial whether this appear on cross-examination of the Plaintiff's witnesses or in the course of the Defendant's evidence. But there is this difference in the case: that if it appear by the testimony of the Plaintiff's witness, the absence of the writing is an inherent defect in his cause which it is incumbent on him to get over; whereas if it appears from the Defendant's witness, it is an objection which the Defendant must substantiate by the production of the instrument in the regular way: otherwise this inconvenience might follow, — that the Plaintiff might, on a mere assertion of the Defendant, be nonsuited for the non-production of a written instrument, which if it had been produced might turn out not to apply to the contract in question. And the decided cases establish this distinction. The opinion expressed by *Littledale* J. in *Reed* v. *Deere* was confirmed in *Rex* v. *Inhabitants of Rawden*, — where upon the trial of an appeal, the appellants having proved that the pauper occupied a tenement of 10*l.* per annum, and paid rent and taxes for the same, the respondents, in

1829.

FIELDER v. RAY.

order to shew that the pauper was not the sole tenant attempted to prove by parol that the premises were let to the pauper and two other persons; but the witness, on cross-examination, having stated that the letting was by a written instrument, it was held that it could be proved only by the production of that instrument: — and in *Stephens* v. *Pinney* (*a*): there, in an action on the common counts for work and labour, it was held that the plaintiff, having established his case by other evidence, was not precluded from recovering, by the defendant's proving the existence of an unstamped and unsigned agreement, which fixed the price, and which the defendant did not give notice to the plaintiff to produce. That case in substance and effect agrees with the present. We cannot see judicially, that this instrument is in existence unless it be produced properly stamped.

However, as it would be hard on the party not to allow him an opportunity of producing the instrument, we think the rule for a new trial should on this ground be made absolute on payment of costs.

PARK J. I concur in thinking that there was evidence of a contract to go to the jury. As to the rejection of the unstamped instrument produced by the Defendant, none of the cases have laid down a rule contrary to that which has been acted on here. *Vincent* v. *Cole* is quite consistent with our present decision, because there, it appearing in the plaintiff's case, that the agreement had been reduced to writing, Lord *Tenterden* held that he must be nonsuited, unless the writing were produced. In *Strother* v. *Barr* (*b*) I said, "that parol evidence of the contents of a written instrument cannot be given where the contract contained in such instrument is the subject of the suit; because

(*a*) 8 *Taunt.* 327. (*b*) 5 *Bingh.* 144.

the

1829.

FIELDER v. RAY.

the *terms* of the agreement must depend on the written instrument:" and Lord *Tenterden* has laid it down, that a Judge has no right to inspect such an instrument, unless it be produced in the regular way; otherwise he might be involved in great difficulties.

In *Doe* d. *Wood* v. *Morris* (*a*), where, in ejectment, the landlord proved payment of rent by the defendant, and half a year's notice to quit given to him, it was held he could not be turned round by his witness proving on cross-examination that an agreement relative to the land in question was produced at a former meeting between the same parties, and was on the morning of the then trial seen in the hands of the plaintiff's attorney, the contents of which the witness did not know, no notice having been given by the defendant to produce that paper; for though it might be an agreement relative to the land, it might not affect the matter in judgment, nor even have been made between those parties. That was a stronger case than the present, because the fact came out on cross-examination. But *Stephens* v. *Pinney* is exactly in point. There, in an action on the common counts for work and labour, it was held that the plaintiff, having established his case by other evidence, was not precluded from recovering by the defendant's proving the existence of an unstamped and unsigned agreement, which fixed the price, and which the defendant did not give notice to the plaintiff to produce: this concurs with what was said by *Littledale* J. in *Reed* v. *Deere*: and *Dallas* J. said (*b*), "It is clear, if it had appeared as part of the plaintiff's case, that there was an agreement in writing regulating the price and terms of the work to be performed, he must have produced it; and when produced, it could not have been received in evidence, being unstamped; and the plaintiff

(*a*) 12 *East*, 237.

(*b*) In *Stephens* v. *Pinney*.

then

1829.

FIELDER v. RAY.

then must have been nonsuited. The plaintiff, however, had made out his case; but it appeared in the course of the evidence of one of the witnesses for the defendant, that there was a written agreement. In proving the existence of the written agreement, it turned out to be unstamped, and, therefore, inadmissible in evidence, and, consequently, not amounting to an agreement. The evidence only goes to shew, that a paper, not properly stamped, is in existence." And that was confirmed by the decision in *Rex* v. *Rawden*. There, upon a trial of an appeal, the appellants having proved that the pauper occupied a tenement of 10*l.* per annum, and paid rent and taxes for the same, the respondents, in order to shew that the pauper was not the sole tenant, attempted to prove by parol that the premises were let to the pauper and two other persons; but the witness on cross-examination having stated that the letting was by a written instrument, the Court held, that it could be proved only by the production of that instrument.

It seems to me, therefore, that this writing coming out of the Defendant's hand, and not on cross-examination of the Plaintiff's witnesses, was properly rejected by the Chief Justice. There is no ground, therefore, for a new trial, and it can only be granted on payment of costs, to give the Defendant the opportunity of producing the instrument in a regular way.

BURROUGH J. I am of the same opinion. This instrument was part of the Defendant's evidence; and when the Plaintiff's case has been closed, the Defendant is not to get rid of it by suggesting the existence of a writing which he is unable legally to produce, and on the subject of which he might have cross-examined the Plaintiff's witnesses.

Rule absolute for a new trial on payment of costs.

GASELEE J. was absent.

1829.

TATLOCK and Others *v.* SMITH and Others.

Nov. 24.

THIS was an action by the Plaintiffs, as drawers, against the Defendants, as acceptors of certain bills of exchange.

The defence was an agreement, bearing date *October* 22. 1827, (subsequent to the acceptance of the bills,) by which agreement the Plaintiffs and others, creditors of the Defendants, who were silk dyers, consented to appoint certain persons trustees, and as managers and directors of the Defendants' estate, for the purpose of winding up their trading concerns. This agreement was as follows: —

"Memorandum, that we, the undersigned creditors of *Leny Smith* and *Leny Deighton Smith*, of *Paternoster Row* and of *Hackney*, crape manufacturers, do hereby, with their consent testified by them and ourselves severally being partners to and signing this memorandum, agree to appoint *Robert Dodgson*, of *Wood Street, Cheapside*, silk merchant, *Richard Thomas*, of *Fen Court, London*, Gent., and *William Jones Brown*, silk merchant, to be trustees, managers, and inspectors and directors of their estate and effects for the purpose of winding up and settling their affairs, by the collection, sale, and division of their estate and effects equally amongst us their said several creditors: and we, the undersigned creditors, hereby severally consent and agree

By an agreement between Defendants and their creditors, all Defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors, and Defendants were to execute to the trustees a conveyance of all their estate, in which deed were to be inserted all other usual clauses. The trustees carried on Defendants' business, and paid the creditors 10*s.* in the pound; they then tendered for execution by Defendants a conveyance of all their estate, containing a clause of release, which the Defendants objected to as insufficient, and refused to execute the conveyance: the instrument not having been executed by all the creditors, a meeting at which the Defendants were called on to execute was adjourned, that the signature of every creditor might be obtained:

Held, that Plaintiffs, who, as creditors, were parties to the above agreement, could not sue for their original debt, at least, till the conveyance, such as it was, had been executed by all the creditors, and refused by the Defendants.

1829.

TATLOCK v. SMITH.

agree that the said *Robert Dodgson*, *Richard Thomas*, and *William Jones Brown*, shall take a conveyance and assignment of the estate and effects, and shall receive and pay, direct, and manage in all the said affairs until each creditor shall have received the full payment of our said several debts, the surplus to be paid over to *Leny Smith* and *Leny D. Smith*. And it is further agreed, that when sufficient monies shall be collected and raised from the said estate and effects to pay all the creditors 2*s*. 6*d*. in the pound upon their said several debts, the said *Robert Dodgson*, *Richard Thomas*, and *William Jones Brown* shall make and pay such dividend; and so on, a further like dividend of 2*s*. 6*d*. in the pound, until the said several creditors shall be paid the whole of their said debts: and the said *Leny Smith* and *Leny Deighton Smith* do hereby agree to make the said conveyance and assignment of all their said estate and effects unto the said *Robert Dodgson*, *Richard Thomas*, and *William Jones Brown*, whenever thereunto required; in which said deed is to be inserted all other usual and necessary clauses and conditions. And it is lastly agreed, that this agreement is to be void unless all the creditors whose debts shall amount to 20*l*. and upwards shall sign the same within fourteen days from this date, as witness the hands of the several parties, this 22d day of *October* 1827."

The trustees entered on the management of the business; employed the Defendants at a salary to assist them; and by sale of the Defendants' stock were enabled to pay, and paid, 10*s*. in the pound. They then called on the Defendants to execute a conveyance of their real property pursuant to the agreement, but the Defendants objected to do this unless the conveyance contained what they insisted was a usual and reasonable clause, a general release from the creditors. A meeting of the creditors took place, at which a conveyance was tendered,

tendered, with a clause of release which the Defendants deemed insufficient, and therefore refused to execute the conveyance. This deed, such as it was, had not been executed by all the creditors; and the meeting was adjourned in order that it might be ascertained whether a creditor, whose signature to the instrument was wanting, would now execute it. In the mean time the Plaintiffs commenced this action.

The Chief Justice, before whom the cause was tried at the *Guildhall* sittings after last term, thought that the Defendants' objection to execute the conveyance was reasonable; but that, at all events, the action was premature, because, till another meeting of the creditors had been held, and the conveyance, such as it was, had been tendered, signed by all the creditors, it was not certain that the Defendants would not have executed it; he therefore directed a nonsuit.

Adams Serjt. moved for a rule *nisi* to set aside this nonsuit, on the ground that the Defendants, by refusing to execute the conveyance of their real property, had rescinded the agreement into which the Plaintiffs and the other creditors had entered, and were therefore liable to be sued by them as before. In all the cases in which it has been holden, that after a composition deed the debtor is no longer liable to be sued, there has been either an actual assignment of the whole of the debtor's property, or sureties have been given for part payment, or the creditor has given time. *Fitch* v. *Sutton* (*a*), *Steinman* v. *Magnus* (*b*), *Heathcote* v. *Cruickshanks* (*c*). In cases of actual assignment, the debt has been holden to be extinguished; the giving sureties has been holden a good consideration for forbearance; and the giving time to the principal

(*a*) 5 *East*, 230. (*b*) 11 *East*, 390. (*c*) 2 *T. R.* 24.

has

1829.

TATLOCK v. SMITH.

has been holden to discharge the sureties. But none of those ingredients occur in the present case. There has been no conveyance of the freehold, nor has there been any reasonable objection to it; for, by agreement, the trustees were to hold the property till it paid 20*s.* in the pound, when a release would have been unnecessary, and therefore could not have been contemplated. In *Boothbey* v. *Sowden* (*a*), where a man being embarrassed in his circumstances, all his creditors signed an agreement to give him time for the payment of their respective demands by instalments, and to take his promissory notes for the amount, that agreement was holden binding upon each of them, the signing of the others being a sufficient consideration; and it was decided they could not sue for their original cause of action without proving that the agreement had been broken on the part of the debtor. But in *Cranley* v. *Hillary* (*b*), plaintiff, the drawer of a bill of exchange accepted by the defendant, agreed with him and the rest of his creditors to take a composition of 8*s.* in the pound, to be secured by promissory notes to be given by defendant payable on days certain, and that defendant should assign to the creditors, certain debts, upon which they should execute a general release; the assignment was executed, and all the creditors, except the plaintiff, received their composition and executed the release; the plaintiff might have received his promissory notes if he had applied for them, but it did not appear that defendant had ever tendered them to the plaintiff, or that he had ever applied for them; and the plaintiff afterwards, and after the days of payment of the promissory notes had expired, sued the defendant on the bill of exchange: it was holden, that he was not precluded by the agreement from re-

(*a*) 3 *Campb.* 174. (*b*) 2 *M.* & *S.* 120.

covering.

covering. In *Cork* v. *Saunders* (*a*), where there was an actual agreement to release, *Holroyd* J. said, "The effect, however, of this agreement to release seems to be this; not that the composition should operate immediately as a satisfaction when paid, but that the creditors were then to give a formal release by deed, and that the debtor was not to be discharged until such deed was executed." In *Butler* v. *Rhodes* (*b*) the debtor executed a deed of assignment of all his property. In *Jolly* v. *Wallis* (*c*), the creditors accepted of the composition. And in *Thomas* v. *Courtnay* (*d*), where the creditors of an insolvent agreed, by an instrument (not under seal), that they would accept in full satisfaction of their debts 12*s.* in the pound, payable by instalments, and would release him from all demands, and one of the creditors, who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by the debtor, and accepted by a third person, the money due on this bill having afterwards been paid by the acceptor, it was holden, that the creditor might retain it.

A rule *nisi* having been granted,

Wilde Serjt. shewed cause. There is no evidence here of a final and absolute refusal to execute the conveyance; but taking it that there is, the clause for a release was a usual clause on which the Defendants might reasonably insist. The manifest object of the agreement of *October* 22. 1827, was to divest the Defendants of all their property, in order that it might be applied to the discharge of their debts. That agreement was fairly acted on: possession of the stock in trade was given; the trustees had the management of the concern

(*a*) 1 *B.* & *A.* 50.
(*b*) 1 *Esp.* 236.
(*c*) 3 *Esp.* 228.
(*d*) 1 *B.* & *A.* 1.

and

1829.

TATLOCK v. SMITH.

and paid 10*s.* in the pound; and the Defendants had no longer any possession of the property, except as servants to the trustees. It would be unjust, if, after they had deprived themselves of their property for the purpose of satisfying their creditors, a creditor who had acted on and received the benefit of that arrangement should have the power of consigning them to a gaol. Lord *Ellenborough* C. J., in *Cork* v. *Saunders*, says, "The plaintiff, by the terms of the agreement, consents that the property of the defendant shall be assigned, and be in the management exclusively of the defendant, under the direction of the trustees, until *Michaelmas*. How can the plaintiff then replace the other creditors in the same situation? I should have been inclined to remit him to his original rights, if all the other parties could have been placed in their original situation; but that it is impossible. This is an anomalous case, in which the plaintiff cannot stand in his former situation; nor can I say at present that the whole shall be nullified." *Bayley* J. said, "By the terms of the agreement, it is stipulated that the farming concern should be carried on until *Michaelmas* for the benefit of the creditors who might concur; and it contains a further stipulation, that the debtor shall assign all his estate *immediately*, — the consequence of which would be, that he would thereby divest himself of all means of payment. It is true that the defendant remains in possession; but as servant only to the trustees: he has not a single article of property which he can appropriate to the payment of his debts. The plaintiff confides in the trustees, that they will perform the duties reposed in them: this they neglect to do, and they postpone the period at which they ought to sell. The non-division, however, of the property cannot, under the circumstances, remit the creditor to his original rights. The parties not having provided for that event by the terms of the agreement, it appears to

to me that their only remedy is in equity." And *Abbott* J. "It is said, that as the trustees did not sell at *Michaelmas*, the plaintiff may now sue; but how can the debtor get back his effects? I think, therefore, that the circumstance of the plaintiff's not having concurred in postponing the sale does not remit him to his original right of action."

The case of *Cranley* v. *Hillary* has no bearing on the present, the Plaintiff never having received the promissory notes which the Defendant was to give in the way of composition.

Adams was heard in support of his rule.

TINDAL C. J. The ground on which the Plaintiffs were nonsuited was, that they were not in a situation to sue, unless they could shew that the agreement of 1827 was no longer in force, or had been broken by the Defendants. This agreement seems, by its terms, to contemplate a suspension of the right of action on the part of the creditors, and in our judgment that suspension still continues. It begins by stating, that "the said *Robert Dodgson*, *Richard Thomas*, and *William Jones Brown* shall take a conveyance and assignment of the estate and effects, and shall receive and pay, direct, and manage in all the said affairs until each creditor shall have received the full payment of his said several debts; the surplus to be paid over to *Leny Smith* and *Leny D. Smith*: and it is further agreed, that when sufficient monies shall be collected and raised from the said estate and effects to pay all the creditors 2*s*. 6*d*. in the pound upon their said several debts, the said *Robert Dodgson*, *Richard Thomas*, and *William Jones Brown* shall make and pay such dividend; and so on, a further like dividend of 2*s*. 6*d*. in the pound, until the said several creditors shall be paid the whole of their said debts."

1829.

TATLOCK v. SMITH.

This of itself implies, that the trustees are to take all the Defendants' tangible property for the payment of their debts. They *have* taken it, and they have made payments to the extent of 10*s.* in the pound. Is it reasonable that debtors who have surrendered so much, and have thereby deprived themselves of any other mode of effecting payment, should remain liable to hostile proceedings at the suit of their creditors? Their situation itself seems to preclude the possibility of any such intendment. The agreement then goes on, "And the said *Leny Smith* and *Leny Deighton Smith* do hereby agree to make the said conveyance and assignment of all their said estate and effects unto the said *Robert Dodgson*, *Richard Thomas*, and *William Jones Brown*, whenever thereunto required; and in which said deed is to be inserted all other usual and necessary clauses and conditions." I do not say that an absolute refusal to execute the conveyance as it stood might not have remitted the creditors to their rights; but in the present case it is only necessary to observe, that there is no evidence of a sufficient tender of *any* release. One of the creditors was absent at the time the deed was produced, and the business stood over till he should have been consulted on it. The rule, therefore, must be discharged.

PARK J. Our decision is consistent with all the previous cases. On the face of this agreement certain things are to be done, which plainly imply a suspension of the creditors' right to sue, and there is no evidence of any thing having occurred to remit them to their rights.

BURROUGH J. This is a very plain case. The Defendants' property was transferred to trustees, and their debts were partly paid. It has been contended that there

1829.

TATLOCK v. SMITH.

there was no consideration for any forbearance to sue; but that is necessarily implied from the nature of the transaction: the creditors were bound by the agreement having been executed in part; and nothing has been done to remit them to their prior rights.

GASELEE J. This action was at least premature. The meeting at which the terms of the release were discussed was not a final meeting; and consequently there was no proper tender of the release such as it was.

Rule discharged.

REGULÆ GENERALES.

IT IS ORDERED, that in future, where a rule to plead shall have been entered in or of the term in which, or the vacation succeeding the same, any amendment shall be made in a declaration, no new rule to plead shall be necessary, but the defendant shall plead within four days after the amendment, unless otherwise ordered by the Court or the Judge granting leave for the amendment.

N. C. TINDAL.
J. A. PARK.
J. BURROUGH.
S. GASELEE.

IT IS ORDERED, that in future, where a rule to shew cause is obtained in this Court for the purpose of setting aside an annuity or annuities, the several objections thereto intended to be insisted upon by the counsel at the

1829. the time of making such rule absolute, shall be stated in the said rule to shew cause.

N. C. TINDAL.
J. A. PARK.
J. BURROUGH.
S. GASELEE.

IT IS ORDERED, that in future, when a rule to shew cause is obtained in this Court to set aside an award, the several objections thereto intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to shew cause.

N. C. TINDAL.
J. A. PARK.
J. BURROUGH.
S. GASELEE.

MEMORANDA.

IN the course of the last vacation the Hon. Mr. Baron *Hullock* died, at *Abingdon*, on the *Oxford* circuit.

On the 16th *November* in this term, *William Bolland*, Esquire, was called to the degree of the Coif, and gave rings with the following motto: — "*Regi, regnoque fidelis;*" and on the same day was appointed one of the Barons of his Majesty's Court of Exchequer, in the room of the late Mr. Baron *Hullock*, and took his seat accordingly.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term,

In the Tenth and Eleventh Years of the Reign of GEORGE IV.

1830.

FEARN *v.* LEWIS.

Jan. 23.

TO an action on a bill of exchange for 200*l.* the Defendant pleaded the statute of limitations.

At the trial before *Tindal* C. J., *London* sittings after last term, the Plaintiff, in order to take the case out of the statute, put in the following letters, addressed by the Defendant to a friend of the Plaintiff in the year 1828: —

"My dear Sir, — I am this day favoured with yours, and feel obliged by the offer of assistance to settle with Mr. "Plaintiff's claim, with that of others, shall receive that attention that, as an honourable man, I consider them to deserve, and it is my intention to pay them; but I must be allowed time to arrange my affairs, and if I am proceeded against, any exertion of mine will be rendered abortive:"

Held, not an unqualified acknowledgment from which the Court could imply a sufficient promise to pay to take a case out of the statute of limitations.

1830.

FEARN v. LEWIS.

Fearn; and, in the present stage of my affairs, I can only say I shall feel much indebted to Mr. *Fearn* to withdraw his outlawry, and as soon as common decency and my situation will allow, Mr. *Fearn*'s claim, with that of others, shall receive that attention that as an honourable man I consider them to deserve, and it has been and is my intention to pay them. I cannot conclude without saying, I must be allowed time to arrange my affairs; and if I am proceeded against, any exertion of mine will be rendered abortive, and the Bench or *France* must be my destination; and any one who reads my father's will, will soon see how I am situated. My best wishes to all your circle, and I am

"Yours, &c.

"W. LEWIS.

"Dear *Manning*, — I beg leave to apologize for any neglect in regard to answering your kind letter, and I assure you Mr. *Mathias* was desired to call on you when in town, and to arrange with Mr. *Fearn*; however, as it now appears he has not done so, allow me to say I am ready and willing to do any thing and every thing to satisfy Mr. *Fearn* and all my creditors; and my only regret is that, by the way my father has left me, I am totally unable to do more than give up (which I do by deed) almost the whole of my income to my creditors, and no man can do more; and if I am put into prison not one penny will my creditors ever receive. For the truth of this, I refer you now to my father's will, and declare to you, so help me God, I am not worth one pound, and this place is mine to live in, but every thing is left as heir-looms, and cannot be touched by any process; and if my person is laid hold of I never will put in bail, but surrender. Let me hear from you, and am

"Yours, &c.

"W. LEWIS.

It

1830.

FEARN v. LEWIS.

It did not appear on the record that the Defendant had been outlawed in this action, and the Plaintiff failing to prove it, the Chief Justice directed a nonsuit, on the ground that as the letters spoke of a claim in which the Defendant had been outlawed, there was no evidence to connect the acknowledgment contained in them with the demand made by this action.

Taddy Serjt. now moved to set aside this nonsuit and for a new trial. The letters containing a general admission that something was due to the Plaintiff, and referring only to a single claim, it was for the Defendant to shew the affirmative that there were other claims to which the admission might apply, and not for the Plaintiff to prove a negative, that there were no other such claims. In *Frost* v. *Bengough* (*a*), in an action on a promissory note, the defendant having pleaded the statute of limitations, the plaintiff gave in evidence, as proof of an acknowledgment within six years, the following letter from the defendant to the plaintiff:—"Business calls me to *Liverpool*. Should I be fortunate in my adventures, you may depend on seeing me in *Bristol*; otherwise I must arrange matters with you as circumstances will permit." The defendant did not shew that there were any other matters besides the promissory note to which the letter could refer. It was held that it was properly left to the jury to decide whether this letter referred to the matter of the promissory note, and was a sufficient acknowledgment to take the case out of the statute. And *Baillie* v. *Inchiquin* (*b*) is to the same effect. [*Gaselee* J. Subsequent decisions have laid it down that, to take a case out of the statute, there must be a promise to pay, as well as an acknowledgment of the debt.] The Plaintiff was not nonsuited on that ground; but

(*a*) 1 *Bingb.* 266. (*b*) 1 *Esp.* 435.

1830.

FEARN v. LEWIS.

in *Tanner* v. *Smart* (*a*) Lord *Tenterden* laid it down that a promise to pay might be implied from a general acknowledgment if there were nothing to guard or qualify it, as in *A'Court* v. *Cross* (*b*) and *Scales* v. *Jacob*. (*c*)

As to the outlawry not appearing on this record, the action being against a single Defendant, the outlawry would not necessarily appear, as it would where one was outlawed in an action against several.

TINDAL C. J. If upon investigation it shall turn out, on the whole, fruitless to send a case before a second jury, the Court will decline doing so, although the precise objection on which a plaintiff has been nonsuited may not appear tenable. And I think this case ought not to be submitted again to a jury, because the Plaintiff has failed to shew that the legal operation of the acknowledgment made by the Defendant is such as to take the case out of the operation of the statute of limitations.

The question is, whether these letters constitute a distinct and unqualified acknowledgment of an existing debt. Now, the first letter points to a debt on which the Defendant had been proceeded against to outlawry, and though this record might not of necessity shew whether the Defendant had been outlawed or not, yet unless the Plaintiff proved that circumstance, his claim would not appear to be one to which the acknowledgment in the letter could apply. But neither of the letters import such a direct and unqualified acknowledgment of a debt as would authorize the Court in implying a promise to pay. They import no more than an offer on the part of the Defendant to surrender his income, with a view to an arrangement with his creditors,

(*a*) 6 *B.* & *C.* 603. (*b*) 3 *Bingh.* 329. (*c*) 3 *Bingh.* 638.

ditors, provided he be allowed time to arrange his affairs. 1830.

FEARN v. LEWIS.

PARK J. I am of the same opinion, and think the nonsuit right. The letters do not sufficiently appear to apply to the Plaintiff's demand; and, at all events, contain no more than a kind of conditional offer to pay.

GASELEE J. Admitting the rule to be that a promise to pay may be implied from a general and unqualified acknowledgment of a debt; can this be called an unqualified acknowledgment, when the Defendant threatens that he will do nothing if the creditors proceed?

Rule refused.

Hacks Fine.

Jan. 23.

THE rule of court requires, that in *Scotland*, acknowledgments shall be taken before an advocate or writer to the signet. Scotch fine.

The deforciants, ten in number, lived at *Inverness*, 150 miles from *Edinburgh*, the nearest place where advocates and writers to the signet were to be found, and the property intended to pass was of small value.

The *dedimus* was therefore directed to the attornies of the sheriff, one of them a magistrate.

Under these circumstances the Court, on the motion of *Bompas* Serjt., permitted the fine to pass.

1830.

Jan. 27.

FRENCH *v.* BROOKES and Another.

Defendants engaged Plaintiff to superintend mines in *America* for three years, at a salary of 600*l* per annum, to increase 50*l*. every year, and commence from his leaving *England*, with a proviso, that Plaintiff should not be dismissed without a twelvemonth's notice or a twelvemonth's salary, and the reasonable expenses of his return, and that if he stayed at the mines three years, a sum should be allowed for the expense of the return of his family.

THE Defendants, directors of a certain mining company, called the *Famatina* Mining Company, engaged the Plaintiff to superintend their mines under the following agreement.

Articles of agreement entered into, this 27th *August* 1825, between *John Oliver French*, Esq. of the one part, and *Henry James Brooke*, Esq., and Lieutenant Colonel *Rowan*, for and on behalf of the *Famatina* Mining Company on the other part.

The said *John Oliver French* shall forthwith proceed to *Buenos Ayres*, and from thence to the mines, and employ himself for the space of three years, to be computed from the date of his arrival at the mines (but determinable, nevertheless, as hereinafter mentioned), in the service of the said company, in the capacity of commissioner or superintendent.

The said *John Oliver French* shall, while in *South America*, reside in such places, and remove from time to time to such parts as shall appear to be most conducive to the interests of the said company; he shall devote the whole of his time and attention to the service of the said company, and shall not, during his con-

Plaintiff left *England* in *August* 1825, and arrived at the mines in *April* 1826.

Defendants dismissed Plaintiff in *September* 1827, without giving notice or paying a year's salary, or any expenses of return. In an action for breach of the contract, a verdict having been given with damages to cover a year's salary from the time of dismissal, with leave for the Plaintiff to move to increase the damages by 320*l*., the expense of the return of the Plaintiff's family, and 470*l*., the amount of salary from the end of a year after dismissal to the end of the third year after his arrival at the mines,

Held, that the Plaintiff was not entitled to increase the damages by the amount of those sums.

tinuance

tinuance in their service, directly or indirectly be engaged in any other transaction, speculation, or undertaking whatsoever.

The said directors shall pay, or cause to be paid, unto the said *John Oliver French*, as a remuneration for his services, the following salary, that is to say, at the rate of the sum of 600*l.* sterling, from the day of his embarkation for the first year of his service, with an increase of 50*l.* for each succeeding year of his service.

The said directors shall provide a passage for the said *John Oliver French* in such vessel as they may think fit to *South America*, and shall defray the expense of such passage, and of the journey of the said *John Oliver French* from thence to the mines.

The said *John Oliver French* shall also be allowed, in addition to his salary, the costs and expenses of journeys made by him on account of the company.

The said directors shall be at liberty to dissolve this agreement any time on giving to the said *John Oliver French* twelve calendar months' notice in writing, or paying to him twelve months' salary in lieu of such notice, and on paying to him a reasonable sum towards defraying his expenses from *South America* to *England*, the expenses of his journey from the mines to the port of embarkation to be also paid by the company.

If the said *John Oliver French* shall faithfully serve the said company for the space of three years from his arrival at the mines, and shall not, at the expiration of such time, continue to serve the said company under any fresh contract, he shall in like manner be entitled to a reasonable sum towards defraying the expenses of his return to *England*, the expenses of the journey from the mines to the port of embarkation to be paid by the company, and also all reasonable expenses for the return of his family to *England*.

1830.

FRENCH v. BROOKE.

In the event of the said *John Oliver French* becoming at any time incapable of performing his duty, from ill health or by accident, or from any other cause, and if his term of service shall thenceforth cease, the said *John Oliver French* shall be entitled to receive on such termination of his service six months' salary, to be calculated at the rate of salary payable when the said *John Oliver French* shall become so incapable, and also a reasonable sum towards defraying the expenses of his return to *England*, the expenses of the journey from the mines to the port of embarkation to be also paid by the company.

This agreement shall have the same force and effect in *South America* as if the same had been made and concluded in that country.

And, lastly, the said *John Oliver French*, for himself, his heirs, executors, and administrators, doth hereby covenant and declare, with and to the said *Henry James Brooke*, Esq., and Lieutenant Colonel *Rowan*, or the survivor or survivors of them, in trust for the members for the time being of the said company, that he, the said *John Oliver French*, shall and will, from henceforth and during the said term, well and truly observe, perform, fulfil, and keep all and every the stipulations and agreements herein contained, on his part or behalf to be observed, performed, fulfilled, or kept to the best of his health, skill, and ability, and according to the true intent and meaning of these presents, under the penalty of 800*l.* sterling, and which shall be deemed and considered as liquidated damages, and recoverable accordingly. In witness whereof, the said parties to these presents have hereunto set their hand and seals, the day and year above written.

J. O. FRENCH.
H. J. BROOKE.
C. ROWAN.

The

The Plaintiff sailed on his voyage on the 29th of *August* 1825; proceeded to the mines, where, after many misadventures, he arrived on the 14th of *April* 1826; and quitted them in *October* 1827, upon receiving the following letter of dismissal from certain honorary directors empowered to act for the company at *Buenos Ayres*: —

"Senhor Don *Juan O'French.*

"The directors of the *Famatina* Company who subscribe in the necessity under which they find themselves of reducing the expense of the enterprise with which they are charged from the impossibility of sustaining them in which they have been placed by the non-remission of funds on the part of the directors in *England*, have agreed, at a meeting of the 5th inst., to suppress the place of intendant hitherto filled by you. In consequence, immediately upon the receipt of this resolution, you will remain separated (discharged) from the service of the company, and will proceed to deliver over to Senhor Don *Pantaleon Garcia* all the utensils, accounts, and other appurtenances in your charge; to which effect, the directors transmit a complete order of this date to the above-mentioned Senhor *Garcia.*

"The directors hope, from the zeal and delicacy of Senhor *French*, that he will effect this delivery with all the scrupulosity and order possible, in order to avoid torpor in the arrangement of the affairs of the company. All which is communicated for Senhor *French*'s intelligence, and the consequent ends, offering the protestations of their (the directors) accustomed consideration.

(Signed) RAMOS LARREA.
PEDRO SHERIDAN.
BRANLIO COSTA.
FELIX CASTRO.

"*Buenos Ayres, September* 10, 1827."

This

1830.

FRENCH v. BROOKES.

This letter the Plaintiff answered as follows: —

"To the Directors of the *Famatina* Mining Company at *Buenos Ayres*.

"Gentlemen: — I have received your communication, in which you announce that you have suppressed the place of intendant, and that I am to remain separated (discharged) from the service of the company immediately that I receive the above mentioned communication. I protest against the legality of this proceeding, which could not be legally verified, even were it sanctioned by the *English* direction, in the terms which you have thought fit to employ for effecting such dismissal, seeing that the directors, by contract solemnized and admitted, (and even by your own admission in a similar case in your last official letter, which I have in my possession, treating of the discharge of certain of the *English* miners) are obliged to pay me a year's salary in hard dollars, reckoning from the day of dismissal; and provide me with the sum necessary for the reasonable expenses of the voyage of my family to *England*, or otherwise give me a year's notice of dismissal, paying the cost of such voyage.

"I am certain that my relations with the *London* direction are such, as not to warrant the arbitrary sudden dismissal you have resolved on; but in any case, I shall not fail to do the utmost in my power in order to avoid injustice, and to realise the necessary funds, and apply them for conveying to *Buenos Ayres* those of the company's servants whom you by your present proceedings have left in my hands destitute of help and means, even for this purpose.

"The foregoing is the reply of the undersigned, to your communication of the 10th ultimo.

(Signed) J. O. FRENCH.

"*La Rioja, October* 11. 1827."

The

The directors never gave twelve calendar month's notice previously to dissolving the agreement, nor did they pay the Plaintiff a twelve month's salary instead; nor any sum towards defraying the Plaintiff's expenses from *America* to *England*.

The Plaintiff by this action sought to recover damages for the breach of the above agreement, claiming 1815*l*. as a balance due to him from the company. In this sum, among other items, were included 700*l*. for a year's salary, from the date of the dismissal; 320*l*. for the expenses of the Plaintiff's journey from the mines to *Buenos Ayres*, and of the passage of himself, his wife, and four children, thence to *England*; and 470*l*. for the Plaintiff's salary, at 750*l*. per annum, from the 28th *August* 1828 to the 14th *April* 1829, the end of the third year from his arrival at the mines.

No special damage was proved.

Gaselee J. before whom the cause was tried at the last *London* sittings, thought that under the circumstances of the case the Plaintiff could not claim these two latter sums; accordingly, a verdict was found for the Plaintiff for 1025*l*., with leave for him to move to increase damages to the amount of 1815*l*., by adding the two sums of 320*l*. and 470*l*.

Wilde Serjt. now moved accordingly. If the Plaintiff had been permitted to serve out his three years according to the contract, he would have been entitled to the expenses for the return of his family. But unless the contract were legally determined, it must be taken to have been in force for the whole period named in it: and it never was legally determined. The directors were bound by a condition precedent, not to determine the contract without giving a year's notice or a year's salary. Having neglected to give either, they are still liable to the full extent of the agreement; which, as the Plaintiff

1830.

FRENCH v. BROOKES.

Plaintiff was to have three years' salary from the day of his arrival at the mines, entitles him to the 470*l.*, from the 28th of *August* 1827 to the 14th of *April* 1828, as well as to the expenses of his family's return.

Taddy Serjt. moved at the same time to reduce the damages to 461*l.* 18*s.* 4*d.*, on the ground that the jury had not made allowance for a sum which it was alleged the Plaintiff had received in the course of his employment in *America*.

TINDAL C. J. The jury in the main have done justice, and the verdict ought not to be disturbed.

My Brother *Wilde*'s motion stands on the construction of the agreement: he argues, that the contract between the parties not having been determined in the mode pointed out by the agreement, it must be considered as subsisting for the whole time originally contemplated. But this action, like others of the same sort, is brought because the contract has been violated; and the case has been correctly dealt with if the jury have given damages for the breach. The agreement says, "The directors shall be at liberty to dissolve this agreement at any time, on giving to the said *J. O. French* twelve calendar months' notice in writing, or paying to him twelve months' salary in lieu of such notice; and on paying to him a reasonable sum towards defraying his expenses from *South America* to *England*." The jury, therefore, have not erred if they have put the plaintiff in the same situation as if the directors, upon dismissing him, had paid at the time twelve months' salary, and a reasonable sum towards defraying his expenses from *South America* to *England*.

It is true, notice of dismissal was not given; but suppose the directors, at the date of their letter had paid down 750*l.* in addition to the expenses of the Plaintiff's

Plaintiff's own return; would not that have been sufficient? That is the amount which in effect the jury have given, so that there is no part of the agreement which their verdict leaves untouched. The clause for the payment of the expenses of the Plaintiff's family, applies only to the case of three years' service fully performed; but damage for the breach of the contract is what is claimed at the hands of the jury. If any special damage had been alleged and proved, as resulting from the directors not having paid the year's salary at the time of the dismissal, the jury might have found for that; but the sum now claimed for the expenses of the return of the Plaintiff's family was not a demand which, under the circumstances, the Plaintiff was in a situation to make. The rule, therefore, must be refused; and the Defendant's evidence is not sufficiently clear to support the application which has been made on the part of the Defendants.

GASELEE J. (*a*) The only points reserved were, whether the Plaintiff were entitled to the expenses of his family's return, and to salary from *August* 1828 to *April* 1829. On those points I had no doubt, and I think that the evidence affords no adequate ground for the application which has been made on the part of the Defendant.

Rule refused.

(*a*) *Park* J. was absent.

1830.

Jan. 28.

DOE dem. CAMPBELL *v.* SCOTT.

Notice to a weekly tenant to quit at the end of his tenancy next after a week from the date of the notice, sufficient.

THE Defendant in this case was a tenant from week to week, and his week commenced on a *Wednesday*. He received notice to quit on *Friday*, "provided his tenancy expired on *Friday*, or otherwise at the end of his tenancy next after one week from the date of the notice."

After a sufficient time to cover a tenancy commencing with any day in the week this ejectment was brought, and a verdict having been given for the lessor of the Plaintiff,

Lawes Serjt. moved to set it aside and enter a nonsuit, on the ground that the notice was insufficient. It ought, he contended, to have specified some precise time for quitting, or at all events to have required the tenant to quit at the end of his *current week*.

But the Court thought the notice sufficient, and *Lawes*

Took nothing.

1830.

CUMMING and Others, Assignees of CAVANAGH and Others, Bankrupts, *v.* BAILY.

Feb. 3.

TROVER for deeds and bills of exchange.

The question in the cause was, Whether *Nathaniel Cavanagh*, *Henry Brown*, and *William Brown* had committed acts of bankruptcy; as to which the facts were as follow: —

Cavanagh and the *Browns* carried on the business of bankers at *Bath* and *Bristol*. *Henry Brown* lived at *Bristol*, *William Brown* lived in the banking house at *Bath*, and *Cavanagh* lived at *Bath*, but not in the banking house.

During the week ending on *Saturday* the 17th of *December* 1825, the holders of the notes of this firm being seized with a panic, a great drainage of the funds of the bank took place.

William Brown, who had proceeded to *London* for a supply of money on *Monday* the 12th, returned to *Bath* on *Tuesday* the 13th with 6000*l.*, and proceeded again to *London* for more the next day.

On *Thursday* morning the partners remaining in *Bath* sent a special messenger to *Wm. Brown* in *London*, because the absence of another partner would have occasioned suspicion; they urged a further supply, and stated that if the messenger or *Wm. Brown* did not return with it on *Saturday* morning, they could not go on. The messenger returned by *Friday* morning with 1000*l.* Pressing applications were forwarded to *Wm. Brown* for more, and on *Sunday* morning another 1000*l.* arrived by the post. The partners then wrote to *Wm. Brown*, that they had no funds to meet the demands on them, and

1. A bill of exchange is a chattel within the meaning of 6 *G.* 4. *c.* 16. *s.* 3., the fraudulent delivery or transfer of which will constitute an act of bankruptcy.

2. Closing the doors and shutters of a bank is a "beginning to keep house," although the banker be not domiciled at the bank.

1830.

CUMMING v. BAILY.

and that the house must stop, unless they got a supply of gold immediately. They also sent a friend to urge his return.

On *Monday* evening, the 19th, *Cavanagh* and *Henry Brown* came to the resolution of stopping payment, unless *Wm. Brown* arrived on *Tuesday* morning. *Wm. Brown* not having made his appearance on *Tuesday* morning, the door and shutters of the bank at *Bath* were by their directions continued closed, and a placard was posted on the bank door, informing the public that the firm had been under the necessity of suspending their payments.

A great number of persons assembled in the street, and were clamorous for admittance, exhibiting their impatience by knocking at the door and otherwise; but neither the door of the bank nor the windows were opened.

Wm. Brown, on his arrival in *London* on *Wednesday* evening the 14th, went to the *London* Coffee House, *Ludgate Hill*, and was busily occupied till the *Saturday* evening following in exertions to procure money, when he became so agitated with disappointment, that it was thought he might be tempted to commit violence on himself, and at the persuasion of a friend he removed to *Stevens's* hotel in *Bond Street*, where he was found by a messenger from his partners sent to expedite his return. No money was raised after *Saturday*, and notwithstanding the most pressing solicitations by his partners for his immediate return, he did not arrive in *Bath* before *Tuesday* evening the 20th.

He then expressed some surprise and regret at the circumstance of the bank having been closed, and desired that any person who called might be admitted to him.

But such as called were admitted by a private door, and the doors and windows of the bank remained closed as before.

A sum

1830.

CUMMING v. BAILY.

A sum of 300*l.* having been paid by Lady *Delawarr* into the house of the bankrupts' *London* correspondent to the credit of the bankrupts, *Wm. Brown* enclosed in a letter to Lady *Delawarr* a bill of exchange for 300*l.*, drawn by Dr. *Daniel* on *W. J. Smith*, the property of the firm, and advised her ladyship that he had done this in order to allay any uneasiness she might feel from the alarming circumstances of the times. This letter, it was stated, came to Lady *Delawarr*'s hand about the *Christmas* week.

The learned Chief Justice told the jury, that if they thought the closing the doors and windows of the bank by *Cavanagh* and *H. Brown*, was a beginning to keep house, or an absenting themselves with intent to delay creditors, they had thereby committed an act of bankruptcy. He left it to the jury to determine, whether *Wm. Brown* had *remained* in *London* for the purpose of avoiding his creditors, although he had at first come thither for the lawful purpose of procuring money; and also, whether he had sent the bill of exchange to Lady *Delawarr* before or after the 20th of *December*.

A verdict having been given for the Plaintiff on all the points,

Taddy Serjt. moved for a new trial, on the ground that the closing the doors and shutters of the bank was not an act of bankruptcy in *Cavanagh* and *Henry Brown*, the bank not being their place of residence, and the *beginning to keep house* described by the statute applying, as he contended, only to the dwelling-house, and not to the shop or place of business of the trader; that *Wm. Brown* could not be said to have remained in *London* for the purpose of avoiding creditors, when he had so recently proceeded thither for the purpose of raising money; and that the transfer of the bill of exchange to Lady *Delawarr*, if it took place previously to the 20th of *December*, was not a transfer of a chattel to occasion

1830.

CUMMING v. BAILY.

an act of bankruptcy within the third section of 6 *G.* 4. *c.* 16. (*a*); for which he cited an opinion expressed by *Best* C. J. in an unreported *Nisi Prius* case of *Rigley* v. *Bousfield.*

Wilde and *Russell* Serjts. shewed cause.

The closing the bank door and shutters by *Cavanagh* and *Henry Brown* was an act of bankruptcy of the most unequivocal description. Within the spirit of the statute, closing the place of business and refusing admission to creditors is more conclusively an act of bankruptcy than closing the dwelling-house: for it is with the place of business that the creditors are certainly acquainted, and there they have a right at seasonable hours to expect their debtor. In *Dudley* v. *Vaughan* (*b*), Lord *Ellenborough* C. J. ruled, that a trader beginning to keep house with intent to delay his creditors was sufficient to constitute an act of bankruptcy, though he were only denied to be seen, but not denied to be at home. And in *Gillingham and Others* v. *Laing* (*c*), a newsvender, who frequented the *Royal Exchange* for the purpose of collecting intelligence for a newspaper, appointed a creditor to meet him on the *Royal Exchange*, and afterwards directed a friend, if

(*a*) By which it is enacted, "That if any trader shall depart this realm, or being out of this realm shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution; or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels; or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements; or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels; every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy."

(*b*) 9 *East*, 491.

(*c*) 6 *Taunt.* 532.

the

the creditor enquired there for him, to say he was not there: it was held, that this was an "otherwise absenting himself," which constituted an act of bankruptcy within the statute 1 *Jac.* 1. *c.* 15. *s.* 2. So, where he saw a creditor at the theatre, and secreted himself under the stage for the purpose of avoiding him.

Then, admitting that *William Brown* proceeded to *London* for a lawful purpose, there was ample evidence to warrant the jury in finding that he remained there for the purpose of avoiding his creditors, not having courage to meet them. But at all events, the transfer of the bill of exchange (which, from the language of the letter containing it, the jury had a right to presume was previous to the 20th of *December*), was a fraudulent transfer of a chattel within the meaning of the third section of 6 *G.* 4. *c.* 16. All the text books lay it down that *goods* and chattels comprise every species of personal property, including *choses in action* (*a*), even in forfeitures to the crown: and though a distinction was formerly attempted to be made between bonds and simple contract debts, that distinction was overruled in *Slade*'s case. (*b*) "From that time to the present," according to *Abbott* C. J. in *Bullock* v. *Dodds* (*c*) "debts by simple contract have been constantly seized into the king's hands upon outlawry. Indeed, the words *bona et catalla*, jointly or separately, in our ancient statutes and law-writers denote personal property of every kind, as distinguished from real." In the statutes regarding bankrupts the same words have received the same construction from the earliest periods. Thus, bonds and bills have been holden to pass to the assignees under the clauses which vest in them goods in the order and disposition of the bankrupt. *Ryall* v. *Rolle* (*d*), *Hornblower* v. *Proud.* (*e*)

(*a*) 2 *Bl. Com.* 387.
(*b*) 4 *Rep.* 93.
(*c*) 2 *B.* & *A.* 276.
(*d*) 1 *Atk.* 172. 1 *Ves.* sen. 363.
(*e*) 2 *B.* & *A.* 327.

1830.

CUMMING v. BAILY.

Taddy, (*Bompas* Serjt. was with him,) *contrà*. It is not denied that goods and chattels *may* include bills of exchange, but they do not necessarily include them; and it has been holden they ought not to be described as chattels in an indictment. *Sadi* and *Morris*'s case. (*a*) So that it is competent to the legislature to employ those terms in a more restricted sense, and it is proposed to shew that they are so employed in the third section of 6 *G.* 4. That section makes a fraudulent transfer of goods and chattels an act of bankruptcy; an act which was formerly esteemed a crime, and punishable as such. The clause creating an offence will receive a more rigid construction than clauses which merely pass to the assignees goods and chattels found in the disposition of the bankrupt; and this, although the act may be in other respects remedial. In *Bones* v. *Booth* (*b*) it was held, that where an act is at once penal and remedial, the penal clauses are to be construed strictly. The cases, therefore, which have laid down that bills of exchange pass as chattels to the assignees, do not decide the question, whether the transfer of a bill of exchange is a transfer of a chattel constituting an act of bankruptcy. Those cases, too, were decided under repealed statutes, and the present statute must be construed by itself. Now, it may be collected from the statute itself, that the legislature has employed the words "goods and chattels" in the third section in a limited sense, not including bills of exchange; for in that section, the operation of which is penal, no mention is made of bills or bonds; but two acts of bankruptcy are created with respect to goods and chattels: the first, by the party's allowing them to be attached, sequestered, or taken in execution; the second, by his fraudulently transferring them: from which it might be inferred that the effect of a fraudulent transfer was confined to such goods and chattels as may be the subject of attachment, sequestration,

(*a*) 2 *East, Pl. C.* c. 16. s. 37. (*b*) 2 *W. Bl.* 1226.

tion, or execution; (and this was the ground of the opinion of *Best* C. J. in *Rigley* v. *Bousfield*.) But the language of the seventy-third section makes this clear. That section gives the commissioners power to sell and dispose of any goods or chattels which the bankrupt, being at the time insolvent, may have transferred to any person, and also any bills, bonds, notes, or other securities which he may have made over under the same circumstances. By specifying the making over of bills and notes, &c. as something distinguished from the transfer of goods or chattels, it is manifest the legislature never intended to affect the transfer of bills with the consequences of a transfer of other chattels.

Nor was the gift, delivery, or transfer here complete; for the evidence does not shew that the bill ever came to the hands of Lady *Delawarr*, or that she would have accepted it.

[*Per Curiam.* It is the conduct of the donor, not of the donee, that constitutes the act of bankruptcy.]

Then, with regard to *Cavanagh* and *H. Brown*, there was no change of place and no denial of creditors; and without one of those ingredients, their conduct could not be esteemed an absenting themselves, or a keeping house with intent to delay creditors.

TINDAL C. J. I am of opinion that this rule must be discharged. The question is, Whether the evidence in this cause establishes that acts of bankruptcy have been committed by the three partners *Cavanagh*, *Henry Brown*, and *William Brown*. With regard to the former, it appears that they being bankers, and finding themselves insolvent, directed that the door and shutters of their bank should not be opened on *Tuesday* the 20th of *December*; and that they were never opened, notwithstanding persons were clamouring on the outside: and the question is, Whether that was not a beginning to keep house within the meaning of the statute.

1830.

CUMMING v. BAILY.

It has been contended, the *keeping house* in the statute applies only to the *dwelling* house of the party; and that no act of bankruptcy was committed, because *Cavanagh* and *H. Brown* did not dwell at the bank. But there is no ground for such a distinction: on the contrary, the statute seems to apply more appropriately to the place where the trader's business is carried on, and where his creditors may naturally expect to find him, than to his dwelling-house, where that is apart from his place of business. It might fairly be inferred the bankers were within at the time the creditors were clamorous without, and it is therefore difficult to conceive a clearer act of bankruptcy.

With respect to *William Brown*, the acts of bankruptcy are of two kinds: one, the absenting himself with intent to delay his creditors; the other, a fraudulent transfer of a chattel. On the first head, the evidence was, that he went to *London* for the purpose of raising money to support the firm; that he received letters from his partners urging him to return, and stating that the house could not go on unless he did so, or transmitted money; and that, during his stay in *London*, he was employed at different times in the endeavour to obtain money. The question was, Whether he was so employed the whole of the time, or whether, after his exertions had failed, he did not remain for the purpose of avoiding his creditors. As to that, it appeared that a friend, sent up to urge his return, found him, not at places where he was likely to obtain money, but at the West end of the town, in such distress of mind as to give rise to an apprehension that he had a design against his own existence. It was for the jury to determine whether he was then remaining in *London* with the hope of raising money, or for some other reason; and I am not dissatisfied with their decision.

Upon the other point the evidence was, that about the *Christmas* week, the agent of one of the customers

of

1830.

CUMMING v. BAILY.

of the firm received in *London* a letter written by *William Brown*, in which he said, that considering the alarming state of the times, and to allay any apprehension, he had enclosed a security to the amount of the money which his customer had in the bank.

The letter contained a bill of exchange for 300*l.*; and assuming, as the jury have properly found, that the letter was written previously to the 20th of *December*, the question is, Whether a bill of exchange falls within the meaning of the words *goods* and *chattels* in the third section of the 6 *G.* 4. *c.* 16., which makes a fraudulent gift, delivery, or transfer of the trader's goods and chattels an act of bankruptcy; and whether that sense can also be put on the same words in other parts of the act, so that the construction may be uniform throughout. Undoubtedly, in some of the old books, and previously to the decision in *Slade*'s case, bills of exchange seem not to have been considered as goods and chattels. (*a*) But in modern times a different opinion has prevailed; and *goods* and *chattels* have been deemed to include not only things that pass by delivery, but also *choses* in action; an instance of which is presented by the form of this action, which is trover for the bill. It is no answer to say that bills of exchange have not been esteemed chattels under certain acts of parliament creating offences, and that an act of bankruptcy is in the nature of a crime; because, although in times when trade was little practised or understood, some kind of criminality seems to have attached to such an act, such an opinion can no longer prevail, when the legislature itself permits a trader to commit an act of bankruptcy by declaring his insolvency in the Gazette. But the same language is used in the seventy-second section, which enables the commissioners to sell and dispose of goods and chattels in the disposition of the bankrupt, with the consent of

(*a*) See the argument for the Defendant in *Bullock* v. *Dodds*, 2 *B.* & *A.* 268.

1830.

CUMMING v. BAILY.

the true owner. Those words in former acts containing the same provision have been repeatedly holden to include *choses* in action, and in *Hornblower* v. *Proud* the Judges of the Court of King's Bench were unanimous on the point; and though it has been urged that the seventy-third section would lead to a different conclusion, the provisions of that section, expressed in the same language, were to be found in the statutes upon which the cases just alluded to were decided. But looking at the seventy-third section, we may discover the reason why bills and bonds were particularly specified. That section enacts, "That if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration,) have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners shall have power to sell and dispose of the same as aforesaid; and every such sale shall be valid against the bankrupt, and such children and persons as aforesaid, and against all persons claiming under him."

The first part of the section seems to apply to cases where the conveyance or transfer is by deed; and the second, where it is by manual delivery, without which bills or notes do not usually pass; and *gift* or *delivery*, not *conveyance* or *assignment*, is the mode of transfer of chattels specified in the third section. Then, under the seventy-second section, there has been a general understanding in all the Courts, that *goods* and *chattels* include bills of exchange. Upon the principle, therefore, of giving the same construction to the same language in different parts of the same statute, we decide that

that the transfer of the bill of exchange by *William Brown* was an act of bankruptcy within the meaning of the third section. Indeed, it would be a very narrow construction of the act, to hold that a banker, whose most valuable property often consists of bills and notes, could not commit an act of bankruptcy by a fraudulent transfer of them.

PARK J. I am of the same opinion. As to *Cavanagh* and *Henry Brown*, the case very much resembles *Dudley* v. *Vaughan*. (*a*) There the trader ceased to appear as usual in his counting-house, and sat upstairs in a parlour; and, his affairs being much embarrassed, desired his clerks to say to any of his creditors who should call that, on account of the stoppage of a house in *Ireland*, he was obliged to suspend his payments. Lord *Ellenborough* said, "If a trader shuts himself up in his house, debarring all access to it, whereby his creditors are delayed, an act of bankruptcy is established by proof of his having done so. And, generally, if a trader secludes himself in his house to avoid the fair opportunity of his creditors, who are thus deprived of the means of communicating with him, he *begins to keep house* within the meaning of the legislature, and commits an act of bankruptcy. Here the question must turn chiefly upon the intent. It clearly appears that the plaintiff changed his usual place of sitting, and that several of his creditors who called, and must have found him had he remained there, went away without seeing him. Therefore, if he withdrew from the counting-house to the parlour for privacy and seclusion, and with a view to avoid the personal solicitations of his creditors, by so doing he committed an act of bankruptcy." And though the cause was conducted by the Attorney-General of that day, the propriety of this decision was never disputed.

(*a*) 1 *Campb.* 271.

With

1830.

CUMMING v. BAILY.

With respect to *William Brown*, I concur in the finding of the jury; for though it is not an act of bankruptcy if a trader leaves his house for the purpose of obtaining money, yet if he fail to obtain it, and from fear or nervousness delays his return, a jury may reasonably infer that he seeks to avoid his creditors. As to the delivery of the bill of exchange, the arguments drawn from the criminal law have no bearing on the question, because, whatever might have been thought in ancient times, an act of bankruptcy is not now a crime, and, under all the bankrupt statutes, *goods* and *chattels* have been held to include bills of exchange; and seeing that a large portion of the property of bankers must consist of such instruments, it would be absurd to hold the contrary. The point was expressly decided in *Hornblower* v. *Proud*; and as Mr. Justice *Best* was one of the Judges who pronounced that decision, it is difficult to suppose he could afterwards have held the contrary.

GASELEE J. I have not a shadow of doubt as to *Cavanagh* and *Henry Brown*; and there is no reason for thinking the jury have come to an erroneous opinion as to the conduct of *William Brown*. The point as to the bill of exchange has been already decided after an elaborate argument.

BOSANQUET J. abstained from giving any opinion, not having been present during the argument.

Rule discharged.

1830.

RATHBONE *v.* JOHN and DAVID DRAKEFORD. *Feb.* 4.

One of two who had been partners, having, after the partnership was dissolved, given, in an action against the two, a *cognovit* for debt and costs as between attorney and client, without the knowledge of his Co-defendant, the Court set the judgment aside.

ACTION for money paid to the use of the Defendants. The Defendant *David Drakeford*, on the 12th *November* last, gave a *cognovit* for the amount, and to pay costs as between attorney and client; upon which judgment was entered up and execution issued.

A rule *nisi* was obtained to set aside this judgment and execution, upon an affidavit of *John Drakeford* that he had dissolved a partnership with *David Drakeford* in *July* last; that he had never authorized the Plaintiff to pay any sum on account of the partnership; had never heard of the debt in respect of which the supposed payment was made; and that the *cognovit* signed by *David Drakeford* was signed without the knowledge or consent of *John Drakeford*, and subsequently to the dissolution of their partnership.

The Plaintiff thereupon deposed, that at the request of *David Drakeford* he had paid the money sought to be recovered in this action to a person alleging himself to be a creditor of the firm of *John* and *David Drakeford*; *David Drakeford* acknowledging the correctness of the demand, and afterwards alleging that he had the sanction of *John Drakeford* for signing the *cognovit*.

David Drakeford made no affidavit.

Taddy Serjt. now shewed cause against the rule.

The Court will not control the power of a Co-plaintiff to release a Defendant, except upon a very strong case of fraud: *Jones* v. *Herbert*. (*a*) And upon the same

(*a*) 7 *Taunt*. 421.

principle,

1830.

RATHBONE v. DRAKEFORD.

principle, and subject to the same restriction, they will not control the power of a Co-defendant to give a *cognovit*. Here there is no allegation of fraud; and though the *cognovit* was given subsequently to the dissolution of the partnership, the cause of action was a debt incurred during the partnership. An acknowledgment of one partner, made after dissolution of partnership, would bind the other partner, and a *cognovit* ought to have the same effect.

Wilde Serjt., in support of the rule, treated the conduct of *David Drakeford* as a fraud on his partner.

TINDAL C. J. It is quite clear, that after the partnership was dissolved, one of the parties had no power to bind the other to pay costs as between attorney and client.

Rule absolute.

Feb. 4.

TOMLINS *v.* LAWRENCE.

The Plaintiff, in an action against the acceptor of a bill of exchange, being called on by rule to deliver up the bill on payment of debt and costs, was, by delivery of the instrument, holden to have complied with the rule, although he had rendered it a nullity by considerable erasures.

THIS was an action by the indorsee against the acceptor of a bill of exchange.

Taddy Serjt. had obtained a rule, calling on the Plaintiff to shew cause why the proceedings should not be stayed on payment of debt and costs, and why he should not deliver up the bill of exchange to the Defendant.

The

1830.

TOMLINS v. LAWRENCE.

The Plaintiff now offered to deliver up the bill; but certain extraordinary erasures having been made on it while in his hands,

Taddy objected, that the delivery of a paper so spoliated and rendered a nullity, was no compliance with a rule which called for the delivery of a bill of exchange; and required that the proceedings should now be stayed without payment of debt or costs.

TINDAL C. J. The delivery of the paper is a compliance with the requisition in the rule; and if any injury has accrued to the Defendant, he must resort to ulterior proceedings. The spoliation of the bill, however, is sufficient to justify our making the rule absolute without costs.

Rule absolute accordingly.

JOYCE *v.* PRATT.

Feb. 4.

Where Defendant, subsequently to arrest, and before perfecting special bail, was committed to criminal custody, in which he remained, awaiting the decision of the twelve Judges on a point of law arising out of his defence on the criminal charge, the Court refused to enlarge, till the opinion of the Judges should have been delivered, the time for perfecting special bail, or to permit the sheriff's bail to render him.

THE Defendant was arrested on the 5th of *January*, and bail was put in to the sheriff for his appearance in eight days of *St. Hilary*. On the 19th of *January* he was convicted at the *Old Bailey* sessions for stealing 2076 pounds of bristles, but judgment was respited; a point of law being reserved for the opinion of the twelve Judges.

Andrews Serjt., on the part of the bail to the sheriff, obtained a rule calling on the Plaintiff to shew cause

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1830.

JOYCE v. PRATT.

why the bail should not have till the fifth day of next *Easter* term, or until two days after the opinion of the twelve Judges should have been known, to put in and perfect special bail for the Defendant, or render him in discharge thereof.

Jones Serjt. shewed cause. The bail are not entitled to the indulgence asked, nor can it be granted without injury to the Plaintiff. Bail to the sheriff cannot render; their obligation is only for the Defendant's appearance; and till appearance the Plaintiff's proceedings are stayed. Then, this Court cannot issue a *habeas corpus*, to charge in a civil action a prisoner in custody upon a criminal matter; *Walsh* v. *Davies*. (*a*) Nor could the Court of King's Bench do it till bail above have justified; *Sharp* v. *Sheriff*. (*b*)

TINDAL C. J. The justice of the case is, that upon payment of costs, and putting the Plaintiff in the same situation as if bail had been put in in due time, four days be now allowed for putting in and perfecting special bail.

(*a*) 2 *N. R.* 245. (*b*) 7 *T. R.* 226.

1830.

GREENSLADE *v.* HALLIDAY.

Feb. 8.

THE declaration stated,

That before and at the time of committing the grievance by Defendant thereinafter mentioned, a certain close of meadow land, with the appurtenances, situate and being in the parish of *Old Cleeve*, in the county of *Somerset*, and near to a certain stream or watercourse there, was in the possession and occupation of one *William Hagley* the younger, as tenant thereof to Plaintiff, (the reversion thereof then and still belonging to Plaintiff,) to wit, at, &c. That long before, and until and at the time of the committing the grievance thereinafter mentioned, a great part of the water of the said stream or watercourse did run and flow, and of right ought to have run and flowed, and still of right ought to run and flow therefrom, under a certain arch, unto and into and along a certain channel, and thence unto, into, and over a certain close of Defendant, and from thence through a hole under the cellar of a certain dwelling-house, unto and into a certain channel, and from thence unto and into the said close of meadow land, for the irrigating and watering of the said close, and the benefit and improvement of the soil thereof, to wit, at, &c.; yet Defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve Plaintiff in his reversionary estate and interest of and in the said close of meadow land, with the appurtenances, whilst the same was so in the possession and occupation of the said *W. Hagley*

The Plaintiff, who had a right to irrigate his meadow by placing a dam of loose stones across a small stream, and occasionally a board or fender, fastened the board by means of two stakes, which had never been done by his predecessors.

The Defendant, who had rights on the same stream, removed the stakes and the board also.

A verdict having been given for the Plaintiff in an action for such removal, the Court refused to set it aside; holding, that the Defendant had no right to remove the board as well as the stakes, on the ground that the stakes gave the board a character of permanency incompatible with her own rights.

the

1830.

GREENSLADE v. HALLIDAY.

the younger, as tenant thereof to Plaintiff as aforesaid, and whilst the Plaintiff was so interested therein as aforesaid, to wit, on the 1st *January* 1829, at, &c. wrongfully and unjustly, without the leave or licence and against the will of Plaintiff, pulled down and removed, and caused and procured to be pulled down and removed, a certain board before then erected, and then standing and being in and across the said stream or watercourse, for the purpose of diverting and turning the said part of the said water there under the said arch, and unto and into and along the said channel and close of the Defendant, unto and into the said close of meadow land, for irrigating and watering the same and benefiting and improving the soil thereof as aforesaid, and wrongfully and unjustly kept and continued, and caused to be kept and continued, the said board so pulled down and removed as aforesaid, for a long space of time, to wit, from thence hitherto, and thereby, during the time aforesaid, wrongfully and unjustly let down and drew off, and caused to be let down and drawn off, a great part of the water of the said stream or watercourse, which during the time aforesaid ought to have run and flowed, and otherwise might and would have run and flowed, and hindered and prevented the same from running and flowing under the said arch, unto, into, and along the said channel, and thence unto, into, and over the said close of the Defendant, and through the said hole and channel unto and into the said close of meadow land for the purposes aforesaid; and by means of the several premises aforesaid, the said close of meadow land and the soil thereof had been and were greatly impoverished, deteriorated, and lessened in value, and Plaintiff had been and was thereby greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said close of meadow land, with the appurtenances

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1830.

GREENSLADE v. HALLIDAY.

so in the possession and occupation of the said *William Hagley* the younger, as tenant thereof to Plaintiff as aforesaid, to wit, at, &c.

At the trial before *Burrough* J., last *Somerset* assizes, it appeared that the Plaintiff was the proprietor of certain ancient meadow land, near a small stream which flowed through land belonging to the Defendant.

For fifty years the tenants of the Plaintiff, and their predecessors, had been accustomed to enter on the Defendant's land, and pen back the water of this stream, by placing a row of loose stones across it at a certain point; and when the water was so penned back by this dam or obstruction, a portion of it ran through a small archway, along an artificial cut, which passed to some distance over the Defendant's land, and thence irrigated the Plaintiff's meadow.

In seasons when the loose stones would not pen the water sufficiently high for this purpose, the tenants, as the Plaintiff's witnesses alleged, were accustomed to place a board or fender across the stream; but neither the board nor the stones had been permanently fixed, till, in *January* 1829, the Plaintiff's tenant placed a board in front of the stones, and fastened it down by two stakes driven into the bed of the stream, on the top of which stakes were crooks embracing the upper edge of the board.

Whether this board penned the water higher than the ordinary dam of loose stones, or whether a board had ever been used before, except at a remote period, when the Plaintiff's land had belonged to the predecessors of the Defendant, did not very distinctly appear at the trial; the evidence as to those points being conflicting. But the Defendant, conceiving that, at all events, the permanency of the dam might establish for the Plaintiff a right to a greater extent than he had enjoyed before, and be prejudicial to her own enjoyment

1830.

GREENSLADE v. HALLIDAY.

of a mill above and of water meadows below the dam, caused the stakes to be pulled up and the board to be removed; saying to the tenant at the same time, that until it was proved what quantity of water ought to go, he should exercise no right there.

This declaration, however, the learned Judge excluded, as not being admissible evidence, and seemed to think that the Defendant had denied the Plaintiff's right *in toto*. But he told the jury, that if the board acted on the stream in an unusual manner, and penned the water higher than it ought to do, the Defendant was entitled to pull it down. The mode in which it was fastened down he considered immaterial.

A verdict having been found for the Plaintiff,

Merewether Serjt. moved for a new trial, on the ground that on this evidence the Defendant was entitled to the verdict, the Plaintiff having attempted to make that permanent, which before had been only occasional; and also on the ground that the evidence of the Defendant's declaration had been excluded, and that the jury had been misdirected as to the materiality of the mode of fixing the feeder or board.

Wilde Serjt. shewed cause. The declaration of the Defendant not having been made in the presence of the Plaintiff, was properly excluded. Then, as to the dam, provided the water were not penned to a greater height than before — provided the enjoyment of the right was substantially the same — there was no objection in law to the Plaintiff making the dam permanent. The principle laid down in *Luttrel's* case (*a*), and acted on in *Saunders* v. *Newman* (*b*), and *Williams* v. *Morland* (*c*), is, that provided the enjoyment of the right be sub-

(*a*) 4 *Rep.* 87. (*b*) 1 *B. & A.* 258. (*c*) 2 *B. & C.* 910.

stantially

stantially of the same amount as before, slight alterations in the mode of enjoyment are permissible. Thus, a prescription to use water for fulling-mills, will sustain an employment of it for the purpose of corn-mills. In *Saunders* v. *Newman*, *Abbott* J. said, "The owner is not bound to use the water in the same precise manner, or to apply it to the same mill: if he were, that would stop all improvement in machinery."

But the merely securing the fender by two stakes did not impart a character of permanency to the dam; and, at all events, the Defendant could have no right to remove the board.

Merewether. The Defendant's declaration, as accompanying an act, ought to have been admitted in evidence. The verdict of the jury might have turned on the supposition that she had denied the Plaintiff's right *in toto*, while her expressions accompanying the act complained of would have proved that she contested only the *quantum*.

Then, it was most material to the support of the Defendant's own rights over the water, that Plaintiff should not give a character of permanency to an easement which had previously been only occasional. A verdict for the Plaintiff in this cause would establish his right to confine the fender with stakes; which, as they had never been employed before, the Defendant was, at all events, justified in removing. [*Tindal* C. J. But she did more; and if in a plea to an action of trespass she had justified removing the stakes, would that have been any answer to a complaint for removing the board also? As the stream would have carried the board away, unless it had been confined, the removal of it, in addition to the removal of the stakes, was no injury to the Plaintiff; and unless he shew that he is injured

1830.

GREENSLADE v. HALLIDAY.

in the enjoyment of his right, he has no cause of action. *Williams* v. *Morland.*

TINDAL C. J. The Court does not think there has been such a misdirection as to induce us to grant a new trial without payment of costs. The question is, Whether the Defendant has not done more than she is able to justify? And I do not see my way with sufficient clearness to set aside the verdict. The evidence rejected is not of sufficient importance to authorise such a step. For if it had been admitted, and the jury ought still to have come to the same conclusion, the rejection was not material.

But the short ground on which I decide is, that the Defendant has done more than she ought to have done. The board in dispute was fastened by stakes, which was not usual; but the Defendant, instead of removing the stakes alone, removed the board also. If a party who had a right to a stone weir were to erect buttresses, one who should oppose the erection of the buttresses could not justify demolishing the weir as well as the buttresses.

The rest of the Court concurred.

Rule discharged.

1830.

SHAW *v.* The Marquis of WORCESTER.

Feb. 3.

Breaches need not be assigned under 8 & 9 *W.* 3. *c.* 11. on non-payment of an annuity secured by a warrant to confess judgment on a *mutuatus*.

THE Plaintiff had signed judgment and issued execution for the arrears of an annuity, under a warrant of attorney, by which, after reciting the grant of an annuity of 251*l.* the covenant by the Defendant to pay it, and a stipulation that judgment should be entered up under the warrant of attorney as a security for the payment, the Defendant "authorized and empowered the Plaintiff's attornies, or either of them, or any other attorney of the Court of Common Pleas, to appear in the said Court for him the said *Henry* Marquis of *Worcester*, in or as of last *Trinity* term, next *Michaelmas* term, or any subsequent term, and then and there to receive a declaration for him in action of *debt upon a mutuatus* against him for the sum of 3400*l.* at the suit of the said *Benjamin Shaw*, his executors or administrators, and thereupon to confess the said action, or else to suffer a judgment by *nil dicit* or otherwise to pass against the said *Henry* Marquis of *Worcester* in the said action, and to be forthwith entered up against him of record of the same Court for the said sum of 3400*l.*, together with costs of suit. And the said *Henry* Marquis of *Worcester* did thereby further authorize and empower the said attornies, or any one of them, after the said judgment should have been so entered up as aforesaid in the name of him the said *Henry* Marquis of *Worcester*, and as his act and deed, to execute one or more effectual release or releases in the law to the said *Benjamin Shaw*, his heirs, executors, and administrators, of all errors, writs of error, and of all benefit and advantage thereof, *and of all defects and imperfections whatsoever to be committed, occasioned, or suffered in, about, or concerning the*

1830.

SHAW v. Marquis of WORCESTER.

said judgment, or in, about, or concerning any writ, warrant, process, declaration, plea, entry, or other proceeding whatsoever in anywise concerning the said judgment; and for whatsoever the said attornies, or any of them, should do or cause to be done in the premises, that should be to them and every of them a sufficient warrant and authority. And the said *Henry* Marquis of *Worcester* did thereby agree, that when and as often as any default should be made in payment of the said annuity or yearly sum of 251*l.* 12*s.*, and the whole or any part of any quarterly payment of the same should be in arrear and unpaid by the space of twenty-one days, it should and might be lawful to and for the said *Benjamin Shaw*, his executors, administrators, or assigns, to sue out execution or executions upon the said judgment against the said *Henry* Marquis of *Worcester*, his heirs, executors, or administrators, for so much and such part of the said annuity or yearly sum of 251*l.* 12*s.* as should be then due, together with costs, sheriff's poundage, and officers' fees, and all other incidental expenses whatsoever; *and that, without making or entering any previous suggestion, or suing out or executing any writ of* scire facias *or enquiry under the statute made in the eighth and ninth years of the reign of King* William *the Third*, or any other suggestion, writ of *scire facias*, or enquiry whatsoever; and that no writ of error should be brought, or bill in equity filed, or any advantage taken or attempted to be taken by the said *Henry* Marquis of *Worcester*, his heirs, executors, or administrators, for on account of the premises, or any other matter, cause, or thing whatsoever relating to, touching, or in anywise concerning the issuing or executing of any such execution as aforesaid, or any other proceedings which might be had or taken on the said judgment, or to enforce the execution thereof according to the true intent and meaning of those presents."

Wilde

1830.

SHAW v. Marquis of WORCESTER.

Wilde Serjt. obtained a rule *nisi* to set aside the execution for irregularity, on the ground that it had issued without any assignment of breaches pursuant to 8 & 9 *W.* 3. *c.* 11.

Merewether and *E. Lawes* Serjts. shewed cause. The object of the statute was to save parties the expense of resorting to a court of equity to relieve them from the penalty of a bond. But here was no bond, for the warrant is to enter up judgment by *nil dicit* to a declaration on a *mutuatus;* and further, there is an express stipulation that no advantage shall be taken of any error in proceeding, and particularly of the omission to assign breaches. Then, in *Cox* v. *Rodbard* (*a*), it was expressly decided that no suggestion was necessary upon a warrant of attorney with a penal sum conditioned for payment of a less sum by instalments; and in *Austerbury* v. *Morgan* (*b*) the decision was the same, although there was a bond with a penalty in addition to the warrant of attorney.

Wilde. The stipulation that no advantage shall be taken of any error, can no more oust the jurisdiction of this Court, or deprive the Defendant of the beneficial provisions of a remedial act, than a covenant not to sue, or a covenant not to defend: *Kill* v. *Hollister.* (*c*) Indeed, the main object of the statute 8 & 9 *W.* 3. was to protect parties against the effect of their own improvident agreements; and, according to the language of *Abbott* C. J., in *Hurst* v. *Jennings* (*d*), "If this is not a case within the very words of the act of parliament, the judgment by virtue of which the execution has issued has been obtained by means of a contrivance used for the purpose, and calculated to have the effect, if it be

(*a*) 3 *Taunt.* 74.
(*b*) 2 *Taunt.* 195.
(*c*) 1 *Wils.* 129.
(*d*) 5 *B.* & *C.* 656.

1830.

SHAW v. Marquis of WORCESTER.

allowed to remain in force, of defeating the provisions of that act of parliament; and on that ground the execution which has issued on that judgment ought not to stand." But the object of the statute was to reach every species of contract secured by a penalty; and the judgment here is but a penalty to secure the payment of the annuity. A sum secured by a bond was holden to be within the statute, where there was an indenture of even date, by which the party agreed that judgment should be entered against him for any sum which might then or afterwards be due: *Hurst* v. *Jennings:* and this warrant of attorney being given in a sum larger than the annual amount of the annuity, by way of penalty for securing the annual payment, there is as much reason why the statute should require a suggestion as in the case of a bond with a penalty conditioned for the payment of an annuity. *Cox* v. *Rodbard* was not a case of annuity, and *Austerbury* v. *Morgan* was decided without discussion.

Cur. adv. vult.

TINDAL C. J. In this case a judgment has been entered up on a warrant of attorney in an action of debt upon a *mutuatus* for 3400*l.*; and it appears on the face of the warrant of attorney, that on the treaty for the purchase of an annuity, it was agreed that such warrant of attorney should be given, and that judgment should be forthwith entered up under it for better securing the payment of the annuity. And this is an application by the Defendant to the Court to set aside the writ of execution which has been issued for the amount of the arrears of the annuity, on the ground that the Plaintiff ought to have suggested breaches of the covenant for payment of the said annuity, which covenant appears in the recital contained in the warrant of attorney, under the statute of 8 & 9 *W.* 3. *c.* 11. *s.* 8. That statute enacts, "That in all actions upon any bond

bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing contained, if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nil dicit*, the plaintiff upon the roll may suggest as many breaches as he shall think fit." And the question is, Whether a judgment signed under this warrant of attorney falls either within the letter of the act, or the mischief intended to be prevented thereby?

As the law stood at the time this act was passed, if there was a judgment in a court of law for a penal sum, either upon a demurrer, or upon a *cognovit actionem*, or by default, the Defendant was exposed to the danger of an execution for the whole penalty, and had no mode of preventing such an inconvenience but by filing a bill in equity; and the statute was penned to prevent such a mischief, by compelling the Plaintiff to shew, upon the record in the court of common law, the amount of the debt or damages really due, and of enabling the Defendant to dispute such amount before a jury. Thus making an appeal to a court of equity altogether unnecessary.

But a warrant of attorney to enter up a judgment as a security for a debt on demand, was known in practice to the Courts of law long before the passing of the statute of *William*. It was a proceeding subject to their cognisance and interference from the earliest times, and has been regulated by various rules of Court, as the protection of the Defendant or the purposes of justice seem to demand: such an instrument, therefore, does not appear to be within the mischief of the act; for the Courts of common law might at any time, of their own proper jurisdiction, receive an application and afford redress, if this instrument was made the means of oppression or injustice; and in the present case, if the Defendant's affidavits had disclosed any excess in the amount

1830.

SHAW v. Marquis of WORCESTER.

amount for which the *fi. fa.* had issued, beyond the arrears of the annuity, the Court would either have set it aside, or in case of any mistake have referred it to their officer, or if necessary to a jury, to ascertain for what sum the execution ought to stand. The case of a judgment under a warrant of attorney does not appear, therefore, to have called for the interference of the legislature; nor does this mode of securing a debt appear to be comprised within the words used in the act, which speak of judgments by demurrer, confession, or *nil dicit*, and seem rather to apply to such judgments where an action has been really brought by a plaintiff on a bond or for a penalty, than to this mode of securing an ascertained debt or damage, which was then in use and practice in the Courts.

Whilst, therefore, we agree to the authority of the case of *Hurst* v. *Jennings*, we think that case is not inconsistent with the class of cases in which it is held that breaches need not be assigned where the judgment has been entered upon a warrant of attorney given as a security; and we therefore think this rule should be discharged.

Rule discharged.

Feb. 3.

DOE dem. Lord TEYNHAM *v.* TYLER.

A remainderman after a tenant in tail is not a competent witness for the tenant in tail, in ejectment for the entailed property.

THIS ejectment was brought to try the validity of a recovery suffered by the father of the lessor of the Plaintiff in 1789.

The lands in question had, by a deed bearing date in 1756, been settled on the father of the lessor of the Plaintiff in tail male; remainder among others to *Philip Roper*, uncle of the lessor of the Plaintiff, in tail male.

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1830.

Doe dem. Lord Teynham v. Tyler.

The objection to the recovery was, that the father of the lessor of the Plaintiff, at the time of suffering it, was of unsound mind, or at least so imbecile as to be liable to be practised on.

At the trial before *Tindal* C. J., *Middlesex* sittings after *Michaelmas* term, the evidence of *Philip Roper*, the uncle of the lessor of the Plaintiff, and ninety years old, was tendered, and rejected on the ground that the witness had an interest in the result of the cause, although the lessor of the Plaintiff had sons and grandsons.

A verdict having been given for the Defendant,

Jones Serjt. moved for a new trial, on the ground of the exclusion of this evidence, and the admission of other evidence which he alleged ought to have been excluded; but the objections on this latter head are not stated now, as the decision on them was deferred.

The evidence of *Philip Roper* ought to have been received; for at his age, with his nephew's family to precede him, his interest was a mere contingency not to be calculated on; and in modern times the objection has always gone rather to the credit than the competency of the witness. *Walton* v. *Shelley*. (*a*) The two authorities which will be relied on for the Defendant, *Smith* v. *Blackham* (*b*) and *Pyke* v. *Crouch* (*c*), are anterior to *Walton* v. *Shelley* by nearly a century. The first was merely a *nisi prius* case: and in neither of them was the point in question the point to be decided in the cause. In *Smith* v. *Blackham* the question to be decided was the competency of an heir. *Treby* C. J. says, "An heir apparent may be a witness concerning the title of the land, but a remainder-man cannot, for he hath a present estate in the land; but the heirship of the heir is a mere contingency. Tenant in tail, remainder in

(*a*) 1 *T. R.* 300. (*b*) 1 *Salk.* 283. (*c*) 1 *Ld. Raym.* 730.

tail;

1830.

Doe dem. Lord Teynham v. Tyler.

tail; he in remainder cannot be a witness concerning the title of those lands; for he hath an estate, such as it is."

In *Pyke* v. *Crouch* it was resolved, that "if several estates in remainder be limited in a deed, and one of the remainder-men obtain a verdict for him in an action brought against him for the same land, that verdict may be given in evidence for the subsequent remainder-man in an action brought against him for the same land, though he does not claim any estate under the first remainder-man, because they all claim under the same deed."

But the claiming under the same deed does not of itself confer such an interest as to disqualify a witness; and the criterion is, whether the witness claims *through* or *after* the party named in the deed. Where the witness is privy, or claims *through* a party to the deed, he is disqualified; *aliter*, if he merely claims *after*. Thus, executors and administrators are disqualified, because they claim through the testator or intestate: but the remainder-man claims after, not through, the tenant in tail; it must, therefore, be questionable whether a verdict for or against the tenant in tail could be given in evidence for or against the remainder-man. It would be hard if he should be bound by a verdict, in a cause in which he could not interfere or sift the testimony produced.

But unless the verdict were evidence against him, it could not be evidence for him. *Gilbert* says (*a*), "No one can take benefit by a verdict, that had not been prejudiced by it had it gone contrary."

It may further be contended, that a verdict in ejectment can never be given in evidence for or against a witness in the cause. For in *Aslin* v. *Parkin* (*b*) Lord

(*a*) *Gilb. Ev.* 33. 4th edit. (*b*) 2 *Burr.* 668.

Mans-

1830.

DOE dem. Lord TEYNHAM v. TYLER.

Mansfield says, "The judgment only concludes the parties as to the subject-matter of it;" and in other actions a precise question is raised on the record, so that it appears what is the subject-matter determined on by the jury; but in ejectment the record discloses nothing; and the whole evidence in the cause must be produced to shew what has been found by the jury.

In *Doe on the demise of Jones* v. *Wilde* (*a*) the tenant in possession was rejected as a witness; and *Mansfield* C. J. put the rejection on the ground, not of the verdict being evidence against him, but his immediate interest to avoid being turned out of possession.

Then, as to immediate interest, it appears from the authorities cited in the note to 2 *Wms. Saund.* 8. *note* 4. that a reversion expectant upon an estate tail is not assets; and if not assets, it can scarcely be deemed an immediate interest.

Cur. adv. vult.

TINDAL C. J. This rule has been moved for on two grounds: first, on the exclusion of evidence which ought to have been admitted; secondly, on the admission of evidence which ought to have been rejected.

The question as to the first ground of exception is this, — Whether the evidence of the remainder-man in tail is admissible on the part of a prior tenant in tail who has brought ejectment to try the validity of a common recovery, on the ground of the incompetency of the tenant in tail by whom it was suffered; and as to this objection, we are of opinion, both upon principle and on the authority of decided cases, that such evidence is not admissible.

The general rule upon which the incompetency of witnesses is founded, is laid down by Chief Baron *Gil-*

(*a*) 5 *Taunt.* 183.

bert,

1830.

Doe dem. Lord Teynham v. Tyler.

bert, in his *Law of Evidence*, p. 106, in these terms: — "The law looks upon a witness as interested, when there is a certain benefit or disadvantage to the witness attending the consequence of the cause one way." Now this benefit may arise to the witness in two cases: first, where he has a direct and immediate benefit from the event of the suit itself; and, secondly, where he may avail himself of the benefit of the verdict in support of his claim in a future action: and where the case falls within the first description, in which the interest is more immediate and direct, there is no occasion to have recourse to the second principle, where the interest is one degree removed.

Cases daily occur in which the witness is rejected upon the first ground. An executor brings an action for a debt due to his testator's estate: the residuary legatee is not an admissible witness. Not because this verdict would be evidence for or against him in any future suit, for he can neither be Plaintiff nor Defendant in an action relating to this debt; but because he receives an immediate benefit by a verdict for the Plaintiff. So, the tenant in possession, in ejectment, could not be called to prove the title of the Defendant under whom he claims to hold; nor could the landlord be called to prove the title of the tenant who defended the possession. Nor in ejectment, after a *primâ facie* case is made out against the Defendant, could a witness be called to prove himself a real tenant, and the Defendant his bailiff; for the verdict and judgment in this very action would have the effect of turning him out of possession immediately.

In all these cases the witness is excluded, not because the verdict would be evidence for or against him in a future action, but on account of the immediate benefit or injury he would receive by the determination of the very cause itself.

Now

1830.

DOE dem. Lord TEYNHAM v. TYLER.

Now the present case falls within this principle. If Lord *Teynham* recovers in this ejectment, he will be *in* as of his former right. Nothing is better established than that the lessor of the Plaintiff, when he recovers in an ejectment, is in, not merely as of the term which he has granted to *John Doe*, but as of the right and title which he has proved in himself. If he has only a chattel interest, he is in as of that term; if he has a freehold, he is in as of that freehold; if tenant in tail, he is in as such tenant in tail. (See the judgment of Lord *Mansfield* in *Taylor* v. *Horde*. (*a*))

Lord *Teynham*, therefore, if he should have recovered a verdict, would have been tenant in tail in possession under the settlement of 1756. But, by the very same verdict, *Philip Roper*, the proposed witness, would have acquired a vested interest in the remainder in tail under the same settlement.

The seisin of the tenant in tail in possession is the seisin of the remainder-man; the estate in possession, and the estate in remainder being for this purpose but one estate. It seems, therefore, to us, that, upon principle, the witness had a direct and immediate interest in procuring a verdict which should have the effect of revesting his own remainder in tail. And, upon authority, besides the cases which have been referred to in 1 *Salk*. 283. and 1 *Ld. Raym*. 730., there is an opinion of Lord Chief Justice *Lee* in the case of *Commins* v. *The Mayor of Oakhampton* (*b*): "The person to whom the remainder of an estate is, after the determination of a particular estate, limited by a will, cannot be admitted to prove the will; because he has, although it be remote, a vested interest in the matter in question."

We therefore think, that this rule to shew cause ought not to be granted upon the first ground of objection;

(*a*) 1 *Burr*. 114. (*b*) *Say. Rep*. 45.

1830.

DOE dem. Lord TEYNHAM v. TYLER.

tion; but with respect to the second, without giving any opinion upon the result of the rule, we grant a rule to shew cause.

Rule granted upon the second objection.

Feb. 8.

FOSTER and Another *v.* ROBERT CHARLES.

Where a party recommends an agent, by making statements which he knows to be false, he is responsible in damages for the misconduct of the agent, although it be not shewn that the recommendation was given from malice, or with a view to the pecuniary interest of the party recommending.

THE first count of the declaration stated, that the Plaintiffs, before and at the time of the committing the grievances thereinafter mentioned, carried on, and from thenceforth hitherto had carried on trade and business as dealers in tea and other goods, to wit, at *London*, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*; and thereupon the Defendant theretofore, to wit, on the 10th *December* 1824, at, &c. contriving and fraudulently intending craftily and subtilly to deceive and injure the Plaintiffs, and to induce them to employ a certain person, to wit, one *James Jacque*, as their agent in the said business at *Manchester*, in the county of *Lancaster*, to obtain and receive orders for goods to be supplied by them, and to receive and collect money on their account in the way of their said business, for commission and reward to him payable in that behalf, falsely, fraudulently, and deceitfully represented and asserted to the Plaintiffs that the said *James Jacque* had then an excellent connection in that line at *Manchester* and the neighbourhood, and that the house for which he had done business there was no longer able to execute his extensive orders. By means and in consequence of which representation, the said Plaintiffs, and one *William Foster* and *John Holgate*, who at the time

next

1830.

FOSTER v. CHARLES.

next thereinafter mentioned, were partners of Plaintiffs in the said business, not knowing to the contrary, but believing therefrom that the said *J. Jacque* had at the time of such representation an excellent connection in the line of such agency as aforesaid, at *Manchester* aforesaid, and had obtained extensive orders there for some house, were induced to hire and engage, and did afterwards, to wit, on, &c., at *London*, &c., hire and engage the said *J. Jacque* as such agent in their said business at *Manchester* aforesaid, for commission and reward to him payable in that behalf, and did instruct and authorise him in that capacity to obtain and take orders for the sale and supply of goods by the Plaintiffs and their partners in the said business, and collect and receive money for and on account of the Plaintiffs and their partners in the way of the said business: and the said *J. Jacque*, under and by virtue of that employment, did afterwards, to wit, on, &c., at, &c., obtain and take orders for the sale and supply of goods by the Plaintiffs and their partners in the said business, to divers persons to a large amount and value, and to collect and receive for and on account of the Plaintiffs and their partners in the way of the said business, from divers persons divers sums of money: whereas in truth and in fact at the time the Defendant so represented and asserted as aforesaid, the said *J. Jacque* had not an excellent or any connection in the line of such agency at *Manchester* aforesaid, or its neighbourhood, as the Defendant then well knew, to wit, at, &c.: and whereas in truth and in fact at the time last aforesaid, the said *J. Jacque* had not obtained extensive orders, or any orders at *Manchester* aforesaid for any house whatsoever, as the Defendant then and there well knew. And the Plaintiffs in fact said, that *J. Jacque* for want of a good and sufficient connection in the line of such agency at *Manchester* aforesaid, and its neighbourhood, did,

1830.

FOSTER v. CHARLES.

under and by virtue of his said employment, obtain orders for the sale and supply of goods on credit by the Plaintiffs and their partners in the said business to divers customers of worse and less respectable characters and circumstances than he otherwise would have done, and did thereby induce the Plaintiffs and their said partners, who were ignorant of the character and circumstances of such customers, to sell to them on credit, and supply them with goods pursuant to such orders, such goods being in the whole of large value, to wit, the value of 2000*l.* of lawful money of *Great Britain*: and although the prices for which those goods were so sold ought long since to have been paid and satisfied to the Plaintiffs and their partners, yet those customers, by reason of such their characters and circumstances, had hitherto refused and neglected to pay for the same, and the last-mentioned goods were wholly lost to the Plaintiffs and their said partners, to wit, at, &c. And the Plaintiffs further said, that the said *James Jacque*, contrary to his duty as such agent, had made away with and converted to his own use, and had not paid or accounted for to the Plaintiffs and their partners divers large sums of money collected and received by him as such agent as aforesaid, amounting in the whole to a large sum, to wit, 2000*l.* of like lawful money, which was thereby wholly lost to the Plaintiffs and their said partners, to wit, at, &c. And the Plaintiffs further said, that *J. Jacque*, contrary to his duty as such agent, had neglected and refused to render due and sufficient accounts to the Plaintiffs and their partners of divers large quantities of their goods sold by him, and of the prices of other of their goods which came to his possession as such agent as aforesaid, the value thereof amounting in the whole to a large sum, to wit, 2000*l.* of like lawful money, which goods were thereby wholly lost to the Plaintiffs and their said partners, to wit, at, &c.

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The second and third counts differed from the first in stating more generally the representation made by the Defendant to the Plaintiffs, and their consequent employment of *Jacque*.

The *gravamen* in the fourth count was, that the Defendant at the time he recommended *Jacque* as a desirable agent, knew that he had 800*l.* to pay without any means of doing so; and that *Jacque* being employed by the Plaintiffs failed to account to them.

The fifth count stated, that Defendant requested Plaintiffs to employ *Jacque* as an agent; it then set forth in detail certain embarrassments which *Jacque* was labouring under at the time, of which it was material they should have been informed, and which the Defendant, although it was his duty to inform them, wrongfully, deceitfully, wilfully, and fraudulently withheld and concealed from them; *per quod* they employed and were injured by *Jacque* (nearly as in the first count).

There were four other counts alleging this concealment in various ways.

Plea, general issue.

At the trial before *Tindal* C. J., *London* sittings after *Michaelmas* term, it appeared that in *November* or *December* 1824, the Defendant, a soap manufacturer, called on the Plaintiffs, wholesale tea dealers, with whom he was on terms of intimacy, and after asking them if they did business at *Manchester*, said "he had a young friend for whom he was anxious to procure a commission in the tea trade at *Manchester*: a nice young man; who had an excellent connection there, and would be a great acquisition to any person who wanted to do business there: the Defendant being on such terms with the Plaintiffs, he had offered it to them before he proposed it to *Smith* and Co., a respectable house in the same line of business; that *Smith* and Co. would jump at the offer; that his friend was so excellent a young

1830.

FOSTER v. CHARLES.

man, that he would rather trust him without security than most men with; that this young man had been doing business at *Manchester* for a *London* tea house, who could no longer execute his extensive orders; that he had an uncle at *Manchester* a clergyman of the *Scotch* church, who would afford him great facilities in the way of business, and knew all the *Scotch* travellers in the trade; that Defendant would like him to sell soap for Defendant and his partner, but feared his other connections would not allow him time."

The Plaintiffs said they had an objection to giving commissions; but the very strong recommendation Defendant had given of his friend would induce them to think of it.

Accordingly, in the beginning of 1825, the Plaintiffs employed *James Jacque* the Defendant's young friend to do business for them on commission at *Manchester*. But by the middle of 1827, after repeatedly sending incorrect statements of the amount of his receipts on their behalf, he contrived to be a defaulter to them to the extent of 900*l.* and upwards, and to involve them in bad debts to a much greater amount.

He then took the benefit of the insolvent debtors' act.

Instead of having been employed in the *Manchester* commission tea trade in the year 1824, as the Defendant had stated to the Plaintiffs, it appeared that he had, at the recommendation of the Defendant, been taken into partnership without any capital by Mr. *R. C. Stewart*, a warehouseman in *London*, in *July* 1823; but great losses having been incurred in that concern, aggravated by a robbery to some amount, Mr. *Stewart* closed the concern and dissolved the partnership in *October* 1824.

Jacque was then indebted to *Stewart* in the sum of 800*l.*, which he undertook by deed, dated *November* 13th, 1824, to pay by instalments, in two, three, and four years; but nothing was ever paid.

All

All this was known to the Defendant, who had acted throughout for *Jacque*, and had negotiated the terms of the dissolution of partnership.

Letters were also put in, written by the Defendant to *Jacque*, after the exposure of the *Manchester* transactions, in which the Defendant exhorted *Jacque* to write various falsehoods to the Plaintiffs with a view to the exculpation of the Defendant, and to conceal from the Plaintiffs his knowledge of some of the transactions at *Manchester*.

When the Defendant was first applied to on the subject by the Plaintiffs, he expressed his regret that his house should have been the means of introducing an unworthy agent to the Plaintiffs, but that, as they had been instrumental in bringing the loss on the Plaintiffs, he would see his partner on the subject, and see what could be done towards relieving them from it. No step of that kind having been taken, the present action was commenced.

Tindal C. J. told the jury to consider whether the representation complained of by the Plaintiffs had ever been made, and if made, whether it was false within the knowledge of the Defendant; for unless it were false within his knowledge, the action did not lie.

The jury having found a verdict for the Defendant,

Wilde Serjt. moved for a new trial, on the ground that the Defendant was clearly responsible to the Plaintiffs for the consequences of a representation false within his own knowledge, if not for the concealment of circumstances which it was material for him to have disclosed upon recommending an agent.

Jones Serjt. shewed cause. The Defendant is entitled to retain his verdict. It is not sufficient to support an action of this kind, that there has been temerity

1830.

FOSTER v. CHARLES.

or inaccuracy in representations made by the Defendant, or that he has omitted to disclose all that he knew.

It must be shewn that he acted with a wicked intent, resolvable into malice or pecuniary interest. This was the opinion of *Grose* J. in *Pasley* v. *Freeman* (*a*), confirmed by *Haycraft* v. *Creasy*. (*b*) He considered recommendations of this kind as falling within the class of nude assertions, on which the party deceived might exercise his own judgment; and where he omitted to make inquiries into the truth of the assertion, it became his own fault from *laches*, if he were deceived.

But at all events, an intent to defraud and injure the Plaintiffs ought to have been shewn. The Defendant might have wished to serve *Jacque*, but there is no proof that he intended to defraud the Plaintiffs; and though *Jacque* had been unsuccessful as a trader at the time of the recommendation, he might, in the estimation of the Defendant, have been a proper person for an agent. Then, the Plaintiffs ought to have acted with more vigilance; for if this action can be sustained for what happened at an interval of three years after the Defendant's recommendation, he will never be absolved from his responsibility; and a mere recommendation will have the effect of a continuing guarantee upon which he may be charged for eventual misconduct, although the party recommended may have conducted himself properly for years.

TINDAL C. J. The Court will be better satisfied if this case is submitted to a second jury. But what has been advanced on behalf of the Defendant as the legal ground of this action is not warranted by any of the decisions. It has been urged that it is not sufficient to shew that a representation on which a plaintiff has acted

(*a*) 3 *T. R.* 54. (*b*) 2 *East*, 92.

was

1830.

FOSTER v. CHARLES.

was false within the knowledge of the defendant, and that damage has ensued to the plaintiff, but that the plaintiff must also shew the motive which actuated the defendant. I am not aware of any authority for such a position, nor that it can be material what the motive was. The law will infer an improper motive if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff.

PARK J. I do not agree in the proposition maintained by my Brother *Jones*. In *Tapp* v. *Lee* (*a*) *Chambre* J. said, "It would be an absurdity in law to hold that if a man draws another into a snare, the party suffering should have no remedy by action. An action on the case for deceit is an action well known to the law; and I cannot agree in the argument which has been used for the defendant, that such actions ought to be confined to representations which are literally false. Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood. As to the case of *Haycraft* v. *Creasy*, I agree with the majority of the Judges who decided the point of law. In that case there was no fraud; but fraud is the foundation of the action. There the defendant himself was misled; every thing which he stated he believed; the ground of action therefore totally failed."

GASELEE J. I do not collect from the decisions that more is necessary to maintain this action than the untruth of the suggestion which has been the occasion of

(*a*) 3 *B.* & *P.* 371.

1830.

FOSTER v. CHARLES.

injury to the Plaintiff, and the knowledge of its untruth by the Defendant.

BOSANQUET J. concurred.

Rule absolute.

Feb. 9.

WEST *v.* TAUNTON.

A suggestion, that Defendant defends by *A. B.*, "who has been appointed solicitor on behalf of his majesty, and acts as such in this behalf," is a sufficient disclosure to the Court that *A. B.* has authority to act under 9 *G.* 4. *c.* 25., and Plaintiff cannot treat the plea as a nullity, although, otherwise than by such suggestion, the record does not shew that the cause concerns matters of revenue.

TROVER for bank-notes, sovereigns, and a watch-seal.

The appearance entered at the filacer's office was,

"*Middlesex.*—*Samuel Hercules Taunton*, ats. *William Joseph West*, cap. returnable fifteen days of *St. Martin. J. G. Walford.*"

A declaration having been sent to Mr. *Walford*, with notice for the Defendant to plead within the usual time, the following plea was filed:—

"And the said *Samuel Hercules Taunton*, by *Joseph Green Walford*, who has been duly appointed solicitor on behalf of his majesty, under the directions of the commissioners of his Majesty's customs, and who acts as such solicitor under such directions in this behalf, comes and defends the wrong and injury when, &c., and says that he is not guilty of the said supposed grievances above laid to his charge, in manner and form as the said *William Joseph West* hath above thereof complained against him; and of this he, the said *Samuel Hercules Taunton*, puts himself upon the country," &c.

The Plaintiff thereupon signed judgment, treating this plea as a nullity, because the Defendant had neither appeared personally nor by an attorney of this Court appointed by him, but by a solicitor of his majesty, who had no authority to act as attorney except in revenue matters, pursuant to 9 *G.* 4. *c.* 25., and there was nothing to shew that revenue matters were in question.

Upon

1830.

WEST v. TAUNTON.

Upon an affidavit by the Defendant that he had no interest in the cause, and was indemnified by the commissioners of his majesty's customs, having seized the property sought to be recovered (including the watch-seal) in his capacity of an officer of police;

That he believed the said property to be the proceeds of a forged note for the payment of money the payment of which was obtained from the receiver-general of his majesty's customs; and

That *Joseph Green Walford* had been duly appointed solicitor to the customs;

Wilde Serjt. obtained a rule *nisi* to set aside the judgment, and, upon delivery to the Plaintiff of the seal referred to in the Defendant's affidavit, and payment of costs up to the time of signing judgment, to stay the proceedings in the action as to the seal, or to strike out the part of the declaration relating to such seal.

Taddy Serjt. shewed cause. A Defendant must either appear personally or by an attorney of the Court, who acts on his retainer; unless in revenue matters, in which, by statute, the solicitor of the crown is permitted to act, although he be not an attorney of the Court.

The statute 9 *G.* 4. *c.* 25. authorises the appointment of persons to act as solicitors on behalf of his majesty in any court or jurisdiction in revenue matters, and that when any person has been appointed to be solicitor or attorney on behalf of his majesty, it shall and may be lawful for such person to act and practise as such solicitor or attorney. But before such solicitor can intervene in a cause, and act without so much as stating that he acts on behalf of the Defendant, the Court must be apprized by previous application or otherwise that the cause concerns revenue matters, otherwise the solicitor is without authority.

The

1830.
WEST
v.
TAUNTON.

The attorney for the lord mayor is nominated by his lordship in open court, and his name is placed on record; but here Mr. *Walford* is not an attorney of the Court, and there is nothing to shew that he has authority to act for the Defendant, or that he is amenable to the jurisdiction of this Court. The plea, therefore, has been properly treated as a nullity.

Wilde. In the recent case of *Rowe* v. *Brenton*, the Court of King's Bench granted a trial at bar, upon the suggestion of the Attorney General that the crown was interested in the cause, without inquiring into the nature of the interest. The averment in the commencement of the plea in this cause, that *J. G. Walford* is solicitor to his majesty and acts in his behalf, is a sufficient intimation of his authority for the Court to proceed on.

TINDAL C. J. I have no doubt as to the authority of Mr. *Walford* to appear as the attorney in this cause. In ancient times, previously to the statute of *Westminster*, no persons were permitted to appear by attorney. The practice being then established by statute, the multitude of persons who assumed to act in that capacity was found inconvenient, and from the time of *James* the Second to *George* the Second various acts were passed for the regulation of attornies, prescribing certain modes of education and other requisites as preliminaries to admission, and imposing penalties on such as might act without observing the necessary formalities.

The object of the 9 *G.* 4. *c.* 25. was to exempt from these penalties persons who, without going through the course prescribed, might be appointed to act as attornies or solicitors for his majesty. The first section enacts, that "Whenever any person has been or is or shall be appointed to be solicitor or attorney on behalf of his majesty, under the orders and directions of the commissioners

missioners of the treasury, customs, excise, or stamps, or under the orders and directions of any commissioners or other person or persons having the management of any other branch of his majesty's revenue for the time being, it is and shall and may be lawful for such person to act and practise as such solicitor or attorney under such orders and directions in all and every court and courts, jurisdiction and jurisdictions, place and places, in every part of the United Kingdom; any thing in any act of parliament, or in any order or rule of any court of justice, or any law, usage, or custom, in force in any part of the United Kingdom relating to solicitors or attornies, or to the admission or practice of such solicitors or attornies, to the contrary in anywise notwithstanding." The second, "That every person who shall or may have acted as such solicitor or attorney, under or in pursuance of or in obedience to any such appointment, orders, and directions as aforesaid, shall be and is hereby respectively indemnified for and on account of the same, and of any act or thing done in pursuance of or in obedience to or in conformity with such appointment, orders, and directions; and if any action, suit, prosecution, or proceeding, hath been or shall be commenced against any person for or in respect of any act, matter, or thing done under such appointment, orders, or directions as aforesaid, it shall be lawful for the defendant or defender in any such action, suit, prosecution, or proceeding, in or before whatever court the same may be commenced or had, to apply to such court by motion in a summary way to stay all proceedings whatever against such defendant or defender; and such court is hereby required to make order for that purpose accordingly." And the language employed by Mr. *Walford* in this plea sufficiently discloses to the Court that he is within the statutory exemption. By the same clause also he has authority to act as attorney for those by whom he is appointed.

The

1830.

WEST v. TAUNTON.

The Plaintiff, therefore, had no right to treat this plea as a nullity: but we do not conclude him by this decision, because he may sue for the penalty if there be a want of the requisite authority.

PARK J. I am of the same opinion. The object of the 9 *G.* 4. *c.* 25. was to exempt the solicitors of public boards from the penalties attached to persons who practise as attornies without having been regularly admitted. It has been objected, that one who acts as attorney should always be amenable as such to the authority of the Court in which he acts: I am not prepared to say that the party acting in this cause would not be so.

GASELEE J. It was not necessary that any previous application should have been made to the Court to enable Mr. *Walford* to act in the cause. From the pleadings and the Defendant's affidavit it sufficiently appears that a matter of revenue was in question.

BOSANQUET J. In revenue matters persons who have been appointed pursuant to the 9 *G.* 4. *c.* 25. are authorised to act as attornies. Mr. *Walford* appears by affidavit to have been so appointed; and the Defendant being entitled to employ him under the circumstances of the case, he was authorised to act. The statute does not confine the privilege to cases in which the crown is concerned.

Rule absolute.

The Court ordered, that on the delivery of the seal according to the terms of the rule, the Plaintiff should not proceed for nominal damages. See *Brunsden* v. *Austen* (*a*), *Pickering* v. *Truste* (*b*), *Tucker* v. *Wright* (*c*), *Earle* v. *Holdernesse.* (*d*)

(*a*) *Tidd. Pr.* 571.
(*b*) 7 *T. R.* 53.
(*c*) 3 *Bingh.* 601.
(*d*) 4 *Bingh.* 462.

1830.

COOK *v.* WARD.

Feb. 9.

LIBEL. The declaration, after the usual inducement of the high estimation in which the Plaintiff was held among his neighbours and other worthy and estimable subjects of this realm at *Chelmsford*, stated that, before the committing of the several grievances by the said Defendant as thereinafter mentioned, one *William Corder*, who had been theretofore tried and convicted of murder at *Bury*, to wit, at *Chelmsford* aforesaid, in the county aforesaid, was about to be hanged for such crime, to wit, at *Chelmsford* in the county aforesaid. Nevertheless, the said Defendant well knowing the premises, but greatly envying the happy state and condition of the said Plaintiff, and contriving, and wickedly and maliciously intending, to injure the said Plaintiff in his said good name, fame, credit, respectability and reputation, and to bring him into public scandal, infamy, ridicule, contempt, and disgrace, with and among all his neighbours and other good and worthy subjects of this realm, and to vex, harass, oppress, impoverish, and wholly ruin the said Plaintiff theretofore, to wit, on, &c., at, &c., falsely, wickedly, and maliciously did compose and publish, and cause and procure to be composed and published, of and concerning the said Plaintiff, a certain false, scandalous, malicious, and defamatory libel, containing therein the false, scandalous, malicious, defamatory, and libellous matter following of and concerning the said Plaintiff; that is to say, "*A Cook* (then and there meaning the said Plaintiff) mistaken for *Jack Ketch*. (From a correspondent.) The following ludicrous occurrence took place

1. It is a libel to publish in a newspaper a story of an individual calculated to render him ludicrous, although he may have told the same story of himself.

2. Proof that the Defendant accounted for the stamp-duties of the paper in question, is proof of publication.

1830.
COOK
v.
WARD.

place at *Bury* shortly after the conclusion of the trial of *Corder* (meaning the said *W. Corder*): — A respectable deputy overseer (meaning the said Plaintiff), not two miles from the parish of *St. Mary*'s in this town, (meaning the town of *Colchester*, in the county aforesaid,) like many other Gents, had the curiosity to hear *Corder*'s trial. Accordingly, he (meaning the said Plaintiff) went to *Bury*, and got admission into court; and the trial being ended, he adjourned to an inn (not of the highest class) to take some porter, amidst a dozen others, who were perhaps as risky as himself. His appearance, which we (meaning the said Defendant) suppose must have been very singular, struck the company that he must be a man 'out of the common way.' Accordingly, the question was whispered amongst them, who he could be: at length, after a deal of *pro* and *con*, it was decided that he could be no other personage than *Jack Ketch*. After a short pause, one of them emphatically said to him, 'Pray, Sir, arn't you the gemman that's come down to hang *Corder?*' Of course such a question was the means of his (meaning the said Plaintiff's) bidding them a respectful farewell.

The stupid elves mistook him (meaning the said Plaintiff) by his look, 'Stead of the *Jack*, he proved to be the *Cook*." By means of the committing of which said several grievances by Defendant as aforesaid, the Plaintiff had been and was greatly injured in his good name, fame, respectability, credit, and reputation, and brought into public scandal, contempt, ridicule, infamy, and disgrace, with and amongst all his neighbours, friends, and acquaintance, and other good and worthy subjects of this realm, insomuch that divers of those friends, neighbours, and subjects had, on account of the committing of the said several grievances by the said Defendant as aforesaid, from thence hitherto wholly refused,

refused, and still did refuse, to have any transaction, acquaintance, or discourse with the said Plaintiff, as they were before used and accustomed to have done, and otherwise would have done, or to hold or permit any intercourse or society with, or to receive or admit him into their respective houses or company, to wit, &c.

At the trial before *Gaselee* J., *Chelmsford* Summer assizes 1829, the proof of publication was by the production of the certified copy of the Defendant's affidavit filed at the stamp office pursuant to the 38 *G.* 3. *c.* 78. In this affidavit the Defendant was described as "*Edward John Ward* of *Colchester*, in the county of *Essex*, printer, publisher, and sole proprietor of the *Colchester Gazette*," and the place of printing the same, as intended to be "at the printing office of the said *Edward John Ward*, belonging to his dwelling-house, situate No. 25. *Head Street*, in the parish of *St. Mary at the Walls*, in the borough of *Colchester*."

The title of the newspaper, when produced, appeared to be "The *Colchester Gazette*, printed and published by *E. J. Ward* (the sole proprietor), *Head Street*, *Colchester*."

The distributor of stamps further proved that the Defendant, as proprietor of the paper, had accounted with him for the duty on advertisements. And a newspaper of the day on which the libel appeared, *August* 23d, 1828, was produced, marked with various charges in red ink, which corresponded with the sum paid by the Defendant to the distributor.

It was objected, on the part of the Defendant, that the certified copy of the affidavit ought not to be admitted as proof of publication, inasmuch as it did not exactly correspond with the description in the newspaper itself. The learned Judge thought that if it were competent to the publisher of a newspaper to raise such an objection, the purpose of the statute in requiring his

1830.
COOK
v.
WARD.

his affidavit would be defeated. He therefore admitted the affidavit in evidence, but reserved the point for the consideration of this Court.

A witness then stated that subsequently to the publication of the libel, the Plaintiff, as assistant overseer of the parish of *St. Mary at the Walls*, was present at a meeting of the burgesses to produce the poor's rates, when, the office of mayor having been declined by a gentleman who had been proposed for it, one of the aldermen said, "If you don't accept the office, you shall be the first I will hang when I come into office;" whereupon some one, pointing to the Plaintiff, said, "There is *Jack Ketch*;" upon which there was a general roar of laughter.

It appeared that before the publication in the newspaper the Plaintiff had told the story of himself to a party of his acquaintance at a public-house in *Colchester*.

The jury gave a verdict for the Plaintiff, with 10*l.* damages.

Jones Serjt., in *Michaelmas* term, moved to set aside this verdict and enter a nonsuit, on the ground, first, that there had been no sufficient proof of publication, the title of the newspaper not corresponding with the affidavit at the stamp office; and, secondly, that the declaration containing no allegation of special damage, evidence of the laugh against the Plaintiff at the vestry ought not to have been admitted; particularly as the Plaintiff was the cause of the laugh, by originally circulating the story himself.

He also moved in arrest of judgment, first, that there was nothing in the alleged libel calculated to injure the Plaintiff, or even to make him the object of ridicule. The production complained of was a dull joke, intended, no doubt, to raise a laugh, but not at the expense of the Plaintiff. Secondly, that the innuendoes referred to facts

not

not sufficiently connected with the statement in the inducement, and the libel, although alleged to be of and concerning the Plaintiff, was not alleged to be of and concerning him and the facts mentioned in the inducement. *Craft* v. *Boite* (*a*), *Hawkins* v. *Hawkey* (*b*), *Todd* v. *Hastings* (*c*), *Rex* v. *Marsden* (*d*), *Rex* v. *Horne*. (*e*)

The Court thought there was nothing in the objections in arrest of judgment, but granted a rule *nisi* on the other points.

Spankie Serjt. now shewed cause. The description of the paper tallied sufficiently with the affidavit at the stamp office. There was a substantial compliance with the requisitions of the act, the object of which was to furnish means of discovering readily the responsible proprietor of a newspaper, and the intention of the legislature might always be defeated by fraud if a proprietor could shield himself by making a colourable differeuce between the title of his paper and the contents of his affidavit. He is the last person, therefore, to whom it can be open to take such an objection. But here was ample proof of proprietorship independently of the affidavit. *Rex* v. *Topham* (*g*) and *Rex* v. *Francklin* (*h*) shew that the adoption of the paper by the Defendant is sufficient to connect him with the publication; and in *Rex* v. *Amphlit* (*i*) the delivery of a newspaper to the officer at the stamp office was holden a sufficient publication to sustain an indictment for libel. Here the Defendant not only delivered the paper, but accounted with the officer for the stamps.

As to the evidence of what passed at the vestry, it was not offered as evidence of special damage, but to

(*a*) 1 *Wms. Saund.* 241.
(*b*) 8 *East*, 427.
(*c*) 2 *Wms. Saund.* 307.
(*d*) 4 *M. & S.* 164.
(*e*) *Cowp.* 672.
(*g*) 4 *T. R.* 126.
(*h*) 17 *How. St. Tr.* 626.
(*i*) 4 *B. & C.* 35.

1830.

COOK v. WARD.

shew the natural and intended consequence of the libel.

Jones. The variance between the affidavit and the title of the paper is fatal. The object of the 38 *G.* 3. was to facilitate the proof of publication by prescribing a certain course which is to be conclusive on the defendant. But the act does not exclude other modes of proof; and therefore if a party elect to take to the statutory proof, he must be careful to see that he is enabled to pursue its provisions; and the question is not whether the Defendant shall be enabled to avail himself of his own inaccuracy, but whether the Plaintiff can produce the proof required by the statute. In *Murray* v. *Souter*, tried before Lord *Tenterden* in *July* last, the defendant was proprietor of the *Manchester Courier*, and in the affidavit had described his residence to be in *Red Lion Street, St. Ann's Square*. On the paper it was described as in *St. Ann's Square*; and it was contended that the variance was immaterial, because one side of the house was in *Red Lion Street*, and another in *St. Ann's Square*. But Lord *Tenterden* held, that as the party was not excluded from other proof of publication, if he relied on the statutory proof, he must bring himself within the statute, and that the discrepancy objected to was fatal.

Then, the payment of the stamp duty, even if it could be considered evidence of proprietorship, is no evidence of publication. In *Rex* v. *Topham* publication at the office of the paper was proved.

But, at all events, the Plaintiff having himself told the story complained of, had no claim for damages; and the evidence of what passed at the vestry ought not to have been introduced, because it was impossible to say whether the persons present were acquainted with the story

story through the Defendant's newspaper or the Plaintiff's own narration.

TINDAL C. J. This rule has been obtained on two grounds; first, that the publication of the libel in question was not made out by sufficient evidence; and, secondly, that with a view to the damages evidence was improperly received.

Upon the first point it will not be necessary for the Court to give any opinion as to the evidence under the statute, because, independently of that, there was abundant evidence of publication to go to the jury. The identical paper was produced, exhibiting the crosses and marks by which the Defendant had accounted for the stamp duty, and had actually paid it to the collector. Can any one doubt that this was evidence to go to the jury?

Upon the second point it has been contended that the damages were given by the jury in consequence of evidence which ought not to have been admitted, — evidence of the Plaintiff's having been the object of laughter at a public vestry. But the declaration alleges that by means of the libel the Plaintiff was brought into contempt and ridicule among his neighbours and acquaintance; and the evidence objected to is, that he was laughed at at a public meeting. The evidence, however, was properly admitted as identifying the subject of the libel, and as a proof of the consequences necessarily resulting from its publication.

It is urged, however, that the Plaintiff could have no claim to damages, because he had told the story of himself. If it could have been shewn that he had authorized the publication of the story, the Court would have granted a new trial. But there is a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to

1830.
COOK
v.
WARD.

all the world through the medium of a newspaper. The rule must be discharged.

PARK J. I abstain from giving any opinion on the construction of the statute, because the point is now pending in another court; but there was in this case ample evidence of publication, independently of the affidavit, and it would have been strange if the jury had drawn any other conclusion.

The other evidence which has been objected to was not admitted for the purpose of shewing special damage, properly so called, but to identify the Plaintiff as the person to whom the ridicule of the libel attached.

As to the Plaintiff's having told the story of himself, that will not justify the Defendant in publishing it all over the country.

The rest of the Court concurring, the rule was Discharged.

Feb. 9. SHARPE and Another, Assignees of HARRISON, an Insolvent, *v.* THOMAS.

A warrant of attorney given to a particular creditor by one who at the time intends to take the benefit of the insolvent debtors' act, is a charge on property or a transfer of it by assignment within the thirty-second section of 7 *G.* 4. *c.* 57.

BY the 7 *G.* 4. *c.* 57. s. 32. it is enacted, "That if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate real or personal, security for money, bond,

bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed, and is hereby declared to be fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this act: provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said court for his or her discharge from custody under this act."

Harrison, the insolvent, finding his affairs embarrassed, and having expressed intentions of taking the benefit of the insolvent debtors' act, called his creditors together on *Friday*, the 5th of *January* 1827, at *Southampton*, and gave instructions for an assignment of all his property to trustees in trust to pay his creditors at large 10*s.* in the pound.

The same night he went to *London*, and on *Monday*, the 8th, executed a warrant of attorney to his brother-in-law, the Defendant, to secure him 700*l.* and interest; the Defendant to be at liberty forthwith, or at any time thereafter to enter judgment and issue execution for the same.

The Defendant entered up judgment on the 12th, issued execution on the 15th, and on the 22d had the whole of *Harrison*'s goods and stock appraised to him at 395*l.* 12*s.*

The other creditors got nothing; and one of them having arrested *Harrison* on the 7th of *February*, he

1830.

SHARPE v. THOMAS.

was declared insolvent, and discharged under the statute the 22d of *March* in that year.

The Plaintiffs, his assignees, then sought to recover from the Defendant, in an action for money had and received, the money which came to his hands under the above warrant of attorney, and at the last *Winchester* assizes a verdict was given for the Plaintiffs, *Tindal* C. J., before whom the cause was tried, directing the jury that the warrant of attorney executed by *Harrison* was void if executed with the intention of petitioning the Court for his discharge under the insolvent debtors' act.

Merewether Serjt. obtained a rule *nisi* to set aside this verdict and enter a nonsuit instead, on the ground that the execution of the warrant of attorney by *Harrison* was not a transfer of, or charge upon his property within the thirty-second section of 7 *G.* 4. *c.* 57. He relied on *Doe d. Mitchinson* v. *Carter* (*a*); where a lessee having covenanted not "to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c. with a proviso that the landlord might in such case re-enter, gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold; and it was holden that this was no forfeiture of the lease; and on *Thompson* v. *Freeman* (*b*), where the defendant upon joining with a bankrupt as surety in two bonds, having received a counter bond of indemnity, and previous to the bankruptcy, before the two bonds became due having received a warrant of attorney to confess judgment from the bankrupt, and having taken possession of goods under it, it was held that he was entitled to retain them against the assignees,

(*a*) 8 *T. R.* 57. (*b*) 1 *T. R.* 155.

though

though the two bonds were not discharged by him till after the execution, nor had the obligees then threatened to resort to him for payment.

Holbird v. *Anderson* (*a*) was also cited, to shew the validity of a warrant of attorney given to and acted on by one creditor after a judgment obtained and execution sued out by another.

Wilde and *Bompas* Serjts. shewed cause. The jury having found that this warrant of attorney was given in contemplation of taking advantage of the insolvent debtors' act, the instrument is void at common law as being an attempt to defeat the object of a statute, and any critical examination of the language of the statute becomes unnecessary. But a warrant of attorney is a security for money (*Mouys* v. *Leake* (*b*) within the meaning of the act. It operates as a charge upon the property of the person giving it; and in *Miles* v. *Rawlyns* (*c*), Lord *Ellenborough* said it appeared to him to constitute a *debitum in præsenti*. Then, the charge being voluntary, and the party insolvent, the instrument is void by the express language of the act. In *Thompson* v. *Freeman*, and *Holbird* v. *Anderson*, there was neither bankruptcy nor insolvency, nor any attempt to defeat the provisions of a statute. And in a subsequent stage of the case of *Doe* v. *Carter* (*d*), where the Court found that the warrant of attorney had been demanded and given with the express intention of eluding a covenant by a tenant not to assign his lease without the consent of his landlord, they held the instrument to be void.

Merewether. A warrant of attorney to confess judgment is no more than an acquiescence in a just demand,

(*a*) 5 *T. R.* 235.
(*b*) 8 *T. R.* 411.
(*c*) 4 *Esp.* 196.
(*d*) 8 *T. R.* 300.

1830.

SHARPE v. THOMAS.

and cannot be esteemed fraudulent in itself, especially as all judgments, are, in contemplation of law, *in invitum*. *Lee* v. *Thurston*. (*a*) Indeed, the validity of such instruments under certain restrictions is recognised by the statute 3 *G*. 4. *c*. 39., which is incorporated into the insolvent act 7 *G*. 4. *c*. 57. *s*. 33. They are not, therefore, *per se* void against the bankrupt or insolvent statutes, and the jury have not found any fraud in the present case as they did in effect in the second report of *Doe* v. *Carter*. The transferring, delivering, or making over any security for money in the language of the thirty-second section of 7 *G*. 4. *c*. 57., must mean the transfer of property holden by way of security, and not the original act of giving security; at least by means of a warrant of attorney: otherwise the thirty-third section, which provides for the case of warrants of attorney executed within twenty-one days of the insolvent's petition, and the thirty-fourth, which impliedly sanctions proceeding on warrants of attorney previously to the imprisonment of the insolvent, would have been unnecessary: and if it had been intended that the insolvent should, under whatever circumstances, be prohibited from giving a warrant, there would have been an express enactment to that effect as in the 6 *G*. 4. *c*. 16. *s*. 3., where the giving a warrant of attorney to confess judgment under certain circumstances, is, for the first time, made an act of bankruptcy.

As to the warrant operating as a charge, it is the execution only, and not the judgment which constitutes any charge on personal estate since the statute 29 *Car*. 2.

TINDAL C. J. The statute on which this argument has been raised was passed for the prevention of

(*a*) 1 *Chit. Rep*. 267.

fraud,

fraud, and ought to receive a large and liberal construction. The question here is, Whether a warrant of attorney given for the express purpose of entering up judgment in four days, and seizing the effects of an insolvent to the detriment of his creditors at large, comes within the words of the statute, "shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever."

A warrant of attorney of itself perhaps would not; but under the circumstances of this case, the instrument was given as, and constituted a charge on, the property of the insolvent. And *Doe* v. *Carter* makes against the Defendant, for when the intention of the parties had been ascertained, a warrant of attorney was in that case holden to operate as an assignment of a lease. The only part of the argument on which I have felt any pressure, is that which has been drawn from the two clauses of the act specifically relating to warrants of attorney; the thirty-third and thirty-fourth: but those sections relate not to fraudulent warrants of attorney, but such as have been given *bonâ fide*, which are nevertheless to be holden void, unless filed twenty-one days before the insolvent's petition, and executed before his imprisonment.

PARK J. The distinction taken between fraudulent warrants of attorney, and those given *bonâ fide*, which are recognized by the act under certain restrictions, is well founded; and the verdict of the jury, therefore, relieves us from any difficulty. In *Doe* v. *Carter*, the warrant of attorney was holden to be fraudulent when it was discovered to have been given for the express purpose of defeating a covenant in a lease; and here, the jury have found that the warrant was given with the intention

1830.

SHARPE v. THOMAS.

intention of taking the benefit of the insolvent act, that is with the intention of defrauding the rest of the creditors; so that the judgment obtained falls within the observation of *Lawrence* J. in *Doe* v. *Carter* (*a*), "How can it considered to be *in invitum*, when it is stated that the warrant of attorney was executed for the express purpose of getting possession of the lease, which could not otherwise be obtained, and that the tenant concurred in that intention? The parties were aware that this lease could not be directly assigned by the lessee in satisfaction of his debt; and therefore they agreed to do that by the appearance of an adverse judgment which by their own act they could not effect; so that it was to appear to be done in *invitum* when in truth it was done voluntarily." Here the Defendant could not have obtained possession of the insolvent's effects but by means of the warrant of attorney; it was therefore a charge on his property within the meaning of the thirty-second section of 7 *G.* 4. *c.* 57.

GASELEE J. Upon the authority of *Doe* v. *Carter*, I consider this instrument to have been a charge on the property of the insolvent within the meaning of the thirty-second section of 7 *G.* 4. *c.* 57.; at least it became so when acted on, and it was intended to be acted on within four days. The thirty-third and thirty-fourth sections apply to warrants of attorney, however meritorious, which are nevertheless to be without effect unless filed twenty-one days before the insolvent's petition.

BOSANQUET J. I am of opinion that this rule ought to be discharged. The object of the 7 *G.* 4. was to effect an equal distribution of the insolvent's property, and the

(*a*) 8 *T. R.* 302.

act

act ought to be so construed as to give effect to that object. The jury in this case have found that the instrument was given with the view of taking the benefit of the insolvent debtors' act, and according to that finding the object of it must have been to give a fraudulent preference to a particular creditor. Under those circumstances it was a charge on the property of insolvent within the meaning of the thirty-second section of the act; and when the effects were sold, it may be taken to have operated as an assignment according to the principle established in *Doe* v. *Carter*.

1830.
SHARPE v. THOMAS.

Rule discharged.

BARLING *v.* WATERS.

Feb. 10.

ONE of the bail in this cause swore that he had property in the funds, and the other that he had paid the amount of a judgment against him in the palace court.

Allowance of bail discharged on affidavit of perjury by bail uncontradicted.

Detainer against principal in custody, refused.

Marewether Serjt., upon affidavits which shewed that these and many other statements made by the bail were false, obtained a rule *nisi* to quash the rule for the allowance of bail, and to detain the Defendant, then in the custody of the sheriff of *Middlesex* for another cause.

Upon affidavit of service of this rule upon the Defendant and both of the bail, and of an order for the bail to attend the court,

Per Curiam. No cause being shewn, we order the allowance of bail to be discharged, but we cannot make absolute

1830.

BARLING v. WATERS.

absolute the latter part of the rule, the bail not being before us, and knowledge of their misconduct not being brought home to the Defendant.

Feb. 10.

HOULDEN *v.* FASSON.

Writ returnable the 3d of *November* instead of "the morrow of *All Souls*," quashed for irregularity.

WILDE Serjt. obtained a rule *nisi* to set aside the *ca. sa.* issued in this cause; the bail-bond taken thereon; the assignment of the bail-bond, and all subsequent proceedings, for irregularity, with costs.

The irregularity was, that by mistake the writ had been made returnable on "the 3d of *November*," instead of the usual return, "the morrow of *All Souls*;" a mistake which the Plaintiff prayed leave of this court last term to amend, but was refused.

Merewether Serjt. shewed cause. Although the statute of 24 *G.* 2. *c.* 48. *s.* 7. requires the writ to be returnable on "the morrow of *All Souls*," that is, the day of the morrow of *All Souls*, which this writ was, it does not in terms require to be returnable on that day by that particular description. And, although the practice has been to use that description of the day, still the Court ought (as they have done in some cases), to look at the substance and not the form, and support the writ, which, in truth, appears to be returnable on the proper day. If the writ be described in the declaration on the bail-bond as returnable "on the morrow of *All Souls*," to wit, the 3d day of *November*, the statute is complied with by such an allegation: and when the writ is produced to prove that allegation, there can be no variance. In all the cases in which a writ has been set aside for being

1830.

HOULDEN v. FASSON.

being returnable on a day certain instead of a general return day, the day certain has not been the identical day of the general return. *Miles* v. *Bond* (*a*), *Inman* v. *Huish* (*b*), *Walker* v. *Hawkey* (*c*), *Crofts* v. *Stockley* (*d*), *Johnson* v. *Dobell.* (*e*) On serviceable process, the party is obliged by statute to indorse the actual day of the month; and the object of the legislature was to render the process thereby more intelligible. [*Park* J. The legislature by requiring the day of the month to be indorsed, shew that they considered it something different from the old legal style of the day, which, but for such enactment, the party must have employed.] The statute compels him to use the new appellation; before, he was at liberty to employ the new or the old.

TINDAL C. J. These common returns have been handed down from time immemorial, and it is singular we should now be called on to make alterations and permit a party to frame writs of his own.

Rule absolute.

(*a*) 1 *Str.* 399.
(*b*) 2 *N. R.* 133.
(*c*) 5 *Taunt.* 853.
(*d*) 5 *Bingh.* 32.
(*e*) 1 *Mo. & P.* 28.

1830.

Feb. 10. SAWBRIDGE, Demandant; JEYES, Tenant; PARSONS and Four Others, Vouchees.

Recovery allowed to pass, although the warrant of several vouchees was on separate pieces of parchment.

ON the motion of *Peake* Serjt., and an affidavit that the vouchees lived in different parts of the country, the Court allowed this recovery to pass and be recorded as of this term, notwithstanding the warrants of attorney, which were joint and several, were on two separate pieces of parchment. Three commissioners residing in different places were named in the *dedimus potestatem.*

Peake mentioned *Balch* v. *Phelps* (*a*), which seemed against his application, but added, that the Court had, on his motion, done the same thing last year. Separate warrants being allowed in real proceedings, it was not easy to see why they should be objected to in fictitious.

TINDAL C. J. The *dedimus* is addressed to commissioners residing in different places, and they, for convenience, take the warrants on separate parchments. I see no objection on principle.

Fiat.

(*a*) 3 *B.* & *P.* 366.

1830.

CHARLETON and Another *v.* MORRIS and BEAVAN, Bail of GREENAWAY.

Feb. 10.

THE bail in this cause consented to a *cognovit* being given "upon such terms as might be agreed on between the Plaintiff and Defendant;" whereupon *Greenaway* gave a *cognovit* on the 5th of *February* 1829, under which he was to pay a portion of the costs on the 5th of *March* then next, and the residue, with the debt and interest, in *May*; and if default were made in either of such payments, the Plaintiffs were to be at liberty to sign judgment, and proceed thereupon as they might be advised.

The bail consented to the Defendant's giving a *cognovit* on such terms as he could obtain from the Plaintiff. A *cognovit* was then given in *February* to pay in *May*; default having been made in *May*, the Defendant negotiated, but in vain, till *June* 13th.

The debt was not paid, and some negotiation took place between the Plaintiffs and *Greenaway*'s attornies for further time; but, the negotiation proving fruitless, judgment was signed against *Greenaway* on the 13th of *June*.

On the 30th of *June* a *ca. sa.* against *Greenaway* was left in the secondary's office, to be returned *non est inventus*. On the 27th of *October* and 18th of *November* two writs of *scire facias* against the bail were left at the office of the sheriff of *Middlesex*, with orders to be returned *nihil*. Judgment was signed against the bail on the 26th of *November*.

The bail having been proceeded against without any notice of this negotiation, the proceedings were set aside.

Of these proceedings the bail deposed they had no notice, till on the 21st of *December* last *Morris* was informed that a writ of execution had been issued against him for the amount of the debt due from *Greenaway* to the Plaintiffs.

On the 22d of *December* (up to which time the writs of *sci. fa.* had not been filed at the *custos brevium* office) the

1830.

CHARLETON v. MORRIS.

the bail took *Greenaway* into custody, and detained him in order to surrender him in discharge of themselves; and, as they deposed, could have done so at any time upon receiving intimation of the Plaintiffs' intention to proceed.

Wilde Serjt., under these circumstances, obtained a rule *nisi* to set aside the two writs of *scire facias*, and the judgment signed thereon. He relied on *Clift* v. *Gye* (*a*), where a plaintiff, with the consent of the bail to the sheriff, having taken a *cognovit*, with a stay of execution for a month, it was held, that although the bail continued liable, the debt not having been paid, yet the plaintiff could not take proceedings against them without giving them notice that the *cognovit* was unsatisfied.

Taddy and *Andrews* Serjts. shewed cause. *Clift* v. *Gye* was a case of bail to the sheriff, and does not apply in the case of bail above, who, after consenting to a *cognovit* on such terms as their principal should agree to, were liable at any time, as much as if no such *cognovit* had been given. After such a concession, they were bound to search for the Plaintiffs' proceedings, and cannot complain of want of notice.

TINDAL C. J. The rule must be made absolute. If the agreement had been that the bail would consent to any terms their principal might make then or afterwards, the case might have been different; though even then it would seem to fall within the principle of that which has been cited. But all the bail agree to here is, a *cognovit* upon such terms as their principal should obtain; that is, upon executing the *cognovit*. If there

(*a*) 9 *B.* & *C.* 422.

were

were subsequent negotiations, the bail should at least have been informed that they were at an end before the Plaintiff proceeded against them.

PARK J. In *Clift* v. *Gye* the defendant was to have time for a month; the responsibility of the bail there was, to perfect special bail; but though time was given for a month, Lord *Tenterden* held they could not be charged till notice was given that the *cognovit* was unsatisfied.

GASELEE J. This Court has repeatedly expressed its displeasure at the practice of returning two *nihils* to a *scire facias*, and then proceeding without notice to the opposite party. The justice of the case is, that the bail should have notice before they are called on in respect of their principal.

BOSANQUET J. concurring, the rule was made

Absolute.

BARNARD M'CRANDLE *v.* BARWISE and WARRY.

Feb. 10.

BARNARD M'CRANDLE being ill and in bed, was, on the 17th *July* 1824, arrested on a *ca. sa.* at the suit of *Barwise*, as the bail of one *Elizabeth Meeke*, whom *Barwise* had sued in the King's Bench for a sum of 141*l.*

Defendant took Plaintiff by mistake, under a bail recognizance, entered into by a person of the same name, and upon discovering the mistake, discharged him after some little delay; Defendant having then pleaded the recognizance in bar to an action of trespass brought by the Plaintiff for the imprisonment, the Court refused to strike out the plea.

M'Crandle had never become bail for Mrs. *Meeke*,

1830.

M'CRANDLE v. BARWISE.

nor had he ever seen or heard of her; and when he was confronted with the clerk of *Warry*, *Barwise*'s attorney, who had seen *Meeke*'s bail justify, the clerk instantly declared that he was not the man who had justified bail under the name of *Barnard M'Crandle*.

Upon the clerk's joining *M'Crandle* in an affidavit to this effect, *Warry*, on the 13th of *August*, promised to see his client *Barwise* immediately, and liberate *M'Crandle*.

M'Crandle, however, continued in custody, till, on the 26th of *August*, the matter was laid before Lord Chief Justice *Abbott*, when, by consent of *Warry*, he was discharged out of custody.

In *August* 1828 *M'Crandle* commenced the present action for trespass and false imprisonment.

The Defendants, after the general issue, pleaded, secondly, by way of justification, that the Plaintiff had, together with one *Pelham Hollis*, acknowledged a recognizance of bail in the action against Mrs. *Meeke*, upon which the *ca. sa.* against him had issued, and that the recognizance was now remaining on the file of the Court of King's Bench.

M'Crandle being advised that he could not safely reply to this plea, obtained leave to postpone putting in his replication till an application should have been made to the Court of King's Bench on the subject of this recognizance.

A rule *nisi* was accordingly obtained in that Court for cancelling the recognizance; but upon cause being shewn, *Bayley* J. and *Littledale* J., the only Judges present, discharged the rule in *Michaelmas* term last, and intimated that the Plaintiff might reply safely, notwithstanding the recognizance.

Upon affidavit of these circumstances,

Adams Serjt., in this term, obtained a rule calling on the Defendants to shew cause why their second plea should

1830.

M'CRANDLE v. BARWISE.

should not be struck out, and the Plaintiff have further time to reply. He moved this on the ground that the plea was false within their own knowledge, their conduct amounting to an admission that they had no right to detain the Plaintiff from the 13th of *August*, when the mistake they had made was acknowledged and liberation promised, to the 26th of *August*, when the Plaintiff was discharged by the judge.

Wilde Serjt., (and *Peake* Serjt. with him,) were to have shewn cause, but the Court called on

Adams to support his rule. Unless this rule be made absolute, the Plaintiff is without redress; he cannot deny the existence of the recognizance, and it is not allowable to falsify the record by saying that the persons named in it, or either of them, did not become bail for Mrs. *Meeke*. [*Tindal* C. J. Why cannot the Plaintiff reply that he is not the *Barnard M'Crandle* named in that record.] It is doubtful whether such a replication would be good on demurrer. But the plea is false within the knowledge of the Defendants, and where that is the case the Court will strike it out. In *Gully* v. *The Bishop of Exeter* (*a*), *Best* C. J. laid it down as a principle, that pleas ought to be true; and upon the Court's striking out several impertinent pleas, *Borough* J. said, "I am happy at this opportunity of giving a death-blow to a practice which has improperly prevailed for many years, and which I have long discountenanced." In *Whale* v. *Lenny* (*b*), the Court refused to permit a defendant to plead inconsistent defences; and here the plea, that the Defendants took the Plaintiff by virtue of his recognizance, is inconsistent with their admission that he is not the person named in the recognizance.

(*a*) 5 *Bingh.* 45. (*b*) 5 *Bingh.* 12.

1830.

M'CRANDLE v. BARWISE.

TINDAL C. J. In this case a rule has been obtained, calling on the Defendants to shew cause why their second plea should not be struck out, and why the Plaintiff should not have further time to reply. It appears that the facts alleged in the second plea, are facts on which the Defendants rely, and I am aware of no authority which would justify us in depriving them of that defence. It might have been a different question if the alleged inconsistency of the defence had been brought to our notice upon the rule to plead several matters, as it was in the case of *Gully* v. *The Bishop of Exeter* (*a*); but, however we may regret that the Plaintiff should be put to difficulties in his reply, we cannot now interfere. It may be worth while, however, for him to consider, whether he may not be mistaken in that view of his case, and, whether, at all events, an action on the case would not lie against the Defendants for keeping him in prison after they knew he was not the person named in the recognizance.

PARK J. concurred.

GASELEE J. I am of opinion, that upon this rule we cannot act. In *Gully* v. *The Bishop of Exeter*, the motion was to discharge the rule for pleading several matters. Where a plea is false on the face of it, the Court has sometimes treated it as a nullity. (*b*) But the present is clearly not a sham plea.

BOSANQUET J. concurring, the rule was

Discharged.

Adams then applied for a rule *nisi* to rescind the rule for pleading several matters, but the Court refused it, saying, that the rule had not been abused as in *Gully* v. *The Bishop of Exeter*.

(*a*) 4 *Bingh.* 525. (*b*) See *Lamb* v. *Pratt*, 1 *D.* & *R.* 577.

1830.

GODLEY *v.* MARSDEN.

Feb. 11.

Where a cause was removed from an inferior court after interlocutory judgment, and before enquiry, the Court refused to award a *procedendo*.

INTERLOCUTORY judgment in an action of trespass on the case, in the county court of *Yorkshire*, had been signed against the Defendant in *October* last for want of a plea, and the cause was set down for enquiry on the 18th of *November*, but a day or two preceding, the Defendant removed it by writ of *pone* into this Court.

Jones Serjt. obtained a rule *nisi* for a writ of *procedendo*, on the ground that the *pone* was too late after judgment by default. He cited the language of *Holroyd* J. in *Walker* v. *Gann* (*a*), that "it was a sound and wholesome general rule, that a cause should not be removed from an inferior jurisdiction after judgment had been signed there, and that the rule was particularly applicable where the defendant suffered judgment by default."

Cross Serjt. who shewed cause, relied on *Bevan* v. *Prothesk* (*b*), where the Court held that the delivery of a *re. fa. lo.* to the clerk of a county court after interlocutory judgment, and before final judgment, is a stop to all further proceedings in that court. He also referred to *Attenborough* v. *Hardy* (*c*), and *Lee* v. *Goodlad* (*d*), where the proceedings were removed after interlocutory judgment, and it was never objected that the removal was too late.

(*a*) 1 *D.* & *R.* 769.
(*b*) 2 *Burr.* 1151.
(*c*) 4 *D.* & *R.* 362.
(*d*) 4 *D.* & *R.* 350.

1830.

GODLEY v. MARSDEN.

Jones. Although the *pone* may stop proceedings, it is competent to the superior court, upon investigation, to award a *procedendo.* In *Attenborough* v. *Hardy*, and *Lee* v. *Goodlad*, the question was not raised; but *Walker* v. *Gann* is later, and in point.

TINDAL C. J. This rule must be discharged. The case of *Walker* v. *Gann* does not apply; for there, not only had judgment been suffered by default, but a jury had found damages upon inquiry, so that nothing remained but the mere form of final judgment. In the present case, there has been no inquiry by a jury. *Cox* v. *Hart* (*a*) is in point; there, a *procedendo* was refused after interlocutory, and before final judgment, although the plaintiff had gone the length of giving notice of executing a writ of inquiry.

PARK J. In *Walker* v. *Gann* the verdict had actually been given, and nothing remained to be done but a mere formal entry. *Cox* v. *Hart* is decisive.

GASELEE J. In *Cox* v. *Hart*, the practice is stated to be to allow the *habeas corpus*, provided it be delivered at any time before the jury is sworn, and that accords with the statute 43 *Eliz. c.* 5.

BOSANQUET J. concurred, and the rule was

Discharged.

(*a*) 2 *Burr.* 758.

1830.

SHEPHERD and Others *v.* Bishop of CHESTER and Others.

Feb. 11.

QUARE impedit. By the first count the Plaintiffs, as the *major part* of the owners of messuages, &c. charged with the payment of yearly sums for the repair of *Grayrigg* chapel in *Lancashire*, and the support of the licensed curate performing divine service therein, claimed the right of nominating a curate for the said chapel, and of presenting him to the bishop to be licensed.

By a second count they claimed a right to nominate and elect the curate, and to present him to the vicar of the parish for the time being for the approval of such vicar, to be by such vicar presented to the bishop to be licensed.

By a third and fourth counts the same rights were claimed for the owners of messuages; omitting the qualification of the *major part.*

The Defendants first took issue on the right in the first count, generally; and, secondly, on the allegation that the Plaintiffs were the major part of the owners of messuages.

Thirdly, they took issue on the right as alleged in the second count generally; fourthly, on the allegation, that the Plaintiffs were the major part of the owners of messuages entitled to the right as alleged in that count; and, fifthly, on the allegation, that the Plaintiffs had presented to the vicar for his approbation.

Similar issues were joined on the third and fourth counts.

1. Plaintiffs, as owners of messuages in a chapelry, alleged a right to appoint a curate, in virtue of their being charged annually for the repair of the chapel.

The proof being, that the chapel was repaired out of the poor-rate, Held, that the allegation was not sustained.

2. Where the point is reserved at the trial, a nonsuit may be entered on issues found for the Plaintiff, notwithstanding there be issues on the same record found for the Defendant.

1830.

SHEPHERD v. Bishop of CHESTER.

At the trial before *Littledale* J. last *Lancaster* assizes, the two first issues were found for the Defendants; the third and fourth for the Plaintiffs, and the fifth was abandoned.

The right being alleged in such as contributed to the repairs of the chapel and to the support of the curate, and the evidence tending to shew that the repairs of the chapel were paid, not by individuals, but out of the poor-rate, it was contended that the variance was fatal; and upon that and other alleged insufficiency of proof, leave was given to the Defendants to move to enter a nonsuit on the issues found for the Plaintiffs, or to amend the *postea* by entering a discharge of the jury on those issues, as being immaterial after the issues found for the Defendants, and the abandonment of the fifth issue.

Wilde Serjt. having obtained a rule *nisi* to that effect,

Jones Serjt, who shewed cause, contended, first, that the two issues found for the Plaintiffs were not immaterial; for, though the Plaintiffs had on the present occasion abandoned the fifth issue touching presentation to the vicar for approval, they might at another time be in a condition to prove it, and then the verdict found for them on the issue shewing their right to appoint the curate, subject to such presentation, would be most material.

Secondly, the jury could not be discharged without the consent of the Plaintiffs given at the trial; and,

Thirdly, that a nonsuit could not be entered after a verdict had been found for the Defendants on any issue.

TINDAL C. J. That verdict was found subject to leave to move to enter a nonsuit on the issues found for the Plaintiffs, in which condition the Plaintiff's counsel acqui-

1830.

SHEPHERD v. Bishop of CHESTER.

acquiesced. If the verdict had been for the Defendants generally, the result might have been different; but it was found on one count only, and the Plaintiffs themselves have occasioned the difficulty, which could not have arisen in the old way of pleading, when the Plaintiff in *quare impedit* was not allowed to have more than one count. The evidence appeared to the learned Judge who tried the cause insufficient to support the count found in favour of the Plaintiffs; it appears so also to us; and it is but just that the Plaintiffs should waive that verdict, and that a nonsuit should be entered.

The rest of the Court concurred, and the rule was made

Absolute.

GRYMES *v.* BOWEREN.

Feb. 11.

CASE for injury to the reversion. At the trial before *Garrow* B., at the last *Norfolk* assizes, it appeared that the Defendant, who occupied as tenant from year to year certain premises belonging to the Plaintiff, had, at his own expense, erected on the premises a pump, which he took away when he quitted them.

A pump erected by a tenant during his term, and very slightly affixed to the freehold, is removable as a tenant's fixture.

The pump was attached to a stout perpendicular plank; this plank rested on the ground at one end, and at the other was fastened by an iron bolt or pin to an adjacent wall, from which it was distant about four inches. The pin, which had a head at one end and a screw at the other, passed entirely through the wall.

The tube of the pump passed through a brick flooring into a well beneath. This well had originally been open, but

1830.

GRYMES v. BOWREN.

but the Defendant had arched it over when he erected the pump; and, in withdrawing the tube, four or five of the floor bricks were displaced, but the iron pin which attached the perpendicular plank to the wall was left in the wall when the plank was removed.

Under the direction of the learned Baron, (who thought the pump parcel of the freehold, inasmuch as it could not have been the subject of larceny at common law,) the jury found a verdict for the Plaintiff, damages 4*l.*, with leave for the Defendant to move to enter a nonsuit.

Wilde Serjt. having obtained a rule *nisi* accordingly,

Storks Serjt. now shewed cause. The general rule is, that what is fixed to the freehold cannot be removed by the tenant without incurring the consequences of waste. The exceptions to this rule have been carefully enumerated by Lord *Ellenborough* in *Elwes* v. *Maw* (*a*), and, as between landlord and tenant, seem resolvable into utensils set up in relation to trade, and matters of ornament, as marble chimney pieces, pier glasses, and the like; and the pump in question does not fall within either of those descriptions. A greenhouse, which has been deemed removable when erected by a nurseryman for the purpose of his trade, (per Lord *Kenyon* in *Penton* v. *Robart* (*b*), yet in ordinary cases has been held irremovable. *Buckland* v. *Butterfield.* (*c*)

Wilde. As between landlord and tenant, the rule with regard to fixtures is less rigid than as between persons standing in any other relation; and custom has introduced another exception. Articles of general utility

(*a*) 3 *East*, 50. (*b*) 2 *East*, 88. (*c*) 2 *B.* & *B.* 54.

and

and domestic convenience (*a*) affixed during the term, have always been holden to belong to the tenant, and are either taken away or valued as between him and the incoming tenant, upon the determination of the term. Such articles are, coppers, ovens, grates, and the like. No doubt a pump might be so imbedded in the freehold as to render its removal improper; but if it be so slightly fixed as the pump in question, and can be moved entire, it falls within the exception of articles for domestic convenience. If this were a landlord's fixture, the tenant might be precluded from removing even a barometer attached to a wall by a nail.

Suppose the well had been deep, and it had been found convenient to draw the water by means of a steam-engine, would the landlord have been entitled to retain the engine?

TINDAL C. J. It is difficult to draw any very general and at the same time precise and accurate rule on this subject; for we must be guided in a great decree by the circumstances of each case, the nature of the article, and the mode in which it is fixed. The pump, as it is described to have been fixed in this case, appears to me to fall within the class of removable fixtures. The rule has always been more relaxed as between landlord and tenant, than as between persons standing in other relations. It has been holden that stoves are removable during the term; grates, ornamental chimney pieces, wainscots fastened with screws, coppers, and various other articles: and the circumstance that, upon a change of occupiers, articles of this sort are usually allowed by landlords to be paid for by the incoming to the outgoing tenant, is confirmatory of this view of the question.

(*a*) See *Amos on Fixtures*, where all the cases are collected.

Looking

1830.

GRYMES v. BOWREN.

Looking at the facts of this case; considering that the article in dispute was one of domestic convenience; that it was slightly fixed; was erected by the tenant; could be moved entire; and that the question is between the tenant and his landlord; I think the rule should be made absolute.

PARK J. The rules with regard to property of this description vary according to the relation in which parties stand towards each other. The rule as between heir and executor is more strict than as between landlord and tenant, and even as between landlord and tenant it has been relaxed in modern times; for in *Lawton* v. *Lawton* (*a*) Lord *Hardwicke* held, that wainscot might be removed by the tenant, although it would have been waste to have removed it in the time of *Hen.* 7.

Perhaps we ought not to look with too much nicety as to the mode in which articles are fixed, when it has been holden that the tenant may remove ovens, coppers, and the like. The present case, however, is clearly distinguishable from *Buckland* v. *Butterfield*, where a conservatory was deeply fixed in the soil, and formed part of the house to which it was attached; and, however I may regret it, seeing that the value in dispute is so small, I am compelled to say that the verdict which has been given is wrong.

GASELEE J. concurred.

BOSANQUET J. I am of opinion, that this pump was removable by the tenant. Whether property of this kind be removable or not, depends in some degree on the relation between the parties: and in the relation of landlord and tenant the rule is less strict than in others:

(*a*) 3 *Atk.* 13.

it

it is more so as between heir and executor, and as between executor and remainder-man. My apprehension has been lest we should be thought to lay down any principle which would apply to cases different from the present. But considering that this is a case between landlord and tenant; that the pump was erected by the tenant; that it is an article of domestic use; and can be removed entire; I think the verdict ought to be set aside.

1830.
GRYMES v. BOWEREN.

Rule absolute.

ADCOCK *v.* FELTON.

Feb. 12.

AN attachment of privilege had issued in this cause on the 29th of *January*, returnable on *Wednesday next after* fifteen days of *St. Hilary*.

Return, "next *after* fifteen days of *St. Hilary*," irregular.

Storks Serjt. obtained a rule *nisi* to set it aside for various irregularities; and, among others, because there was no such return day as *Wednesday* next *after* fifteen days of *St. Hilary*.

"*In* fifteen days of *St. Hilary*," would have been *Wednesday* the 27th of *January*. The *Wednesday* next *after*, was the 3d of *February*, legally styled the *Morrow of the Purification*. As to which,

Jones Serjt., who shewed cause, answered, that an attachment of privilege must be made returnable on a day certain, and not on a general return day *eo nomine*; but that the general return day might be taken for the day certain as well as any other, provided its style, as a general return day, were not adopted. The Plaintiff, there-

1830.

ADCOCK v. FELTON.

therefore, would have been irregular if he had made his writ returnable on the *Morrow of the Purification eo nomine*, because that was the style of the day in its quality of a general return day; but he was regular, and shewed that he meant to employ it as a day certain, by styling it the *Wednesday* after fifteen days of *St. Hilary*.

TINDAL C. J. The return is irregular. It has always been the practice to reckon from one return day to the next ensuing, and then to commence a fresh computation. Parties ought to pursue the old course, and not introduce new terms, which may tend to perplex.

Rule absolute.

Feb. 12.

RUSSELL *v.* DICKSON.

The Court will not take judicial notice of the sheriff's book.

JONES Serjt., on the part of one of the bail, moved to set aside a *cognovit*, and *ca. sa.* in this cause, for irregularity, on an affidavit that the damages laid in the declaration were 300*l.*; that the *cognovit* was given for 500*l.*, conditioned for payment of 250*l.* 17*s.* and 28*l.* 18*s.*, and, that by the writ of *ca. sa.*, *as appeared by an entry in the book kept at the office of the sheriff*, the sheriff was commanded to take the Defendant to satisfy 404*l.* 11*s.* damages recovered by the Plaintiff.

It appeared that the *cognovit* had been sanctioned by the bail themselves, who had signed a consent that it should not exonerate them from their liability; and the only question was, Whether the sheriff's book was sufficient evidence of the irregularity in the amount of the *ca. sa.*

Wilde

1830.

RUSSELL v. DICKSON.

Wilde Serjt., who shewed cause, contended, that the sheriff's book was not a public document, but a mere memorandum, and no evidence when the writ itself might have been inspected.

Jones urged, that upon motions supported by affidavit the same strictness was not observed with regard to evidence as in trials at *Nisi Prius*, and the party might not be able to obtain the writ.

TINDAL C. J. The question is, Whether we are to take judicial notice of the sheriff's book. That may shew one thing, and the writ another. The party might have gone to the office, and have ascertained whether the writ was returned.

Rule discharged.

GREEN *v.* POLE.

Feb. 12.

Plaintiff, who had taken a verdict subject to an award under an order of *nisi prius*, after the case had been heard, and just before the award was about to be made, revoked the arbitrator's authority, with circumstances savouring of *mala fides*, and gave fresh notice of trial.

The order of *nisi prius* not having been made a rule of court, the Court refused to stay proceedings.

BY an order of *Nisi Prius*, and with the consent of all parties, a verdict was taken in this cause for 1000*l.* damages, subject to the award of a barrister.

Before the arbitrator made his award, the Plaintiff revoked his authority by deed, and gave notice for trial at the sittings in this term.

At the time of the recovation, the order of *Nisi Prius* had not been made a rule of Court.

Taddy Serjt., therefore, on the part of the Defendant, obtained a rule *nisi* to stay the proceedings till the

Court

1830.

GREEN v. POLE.

Court should further order, upon an affidavit, which stated, that after all the evidence had been gone through on both sides, at great length, before the arbitrator, the 8th of *December* last was fixed for the counsel to sum up the case, and that the Plaintiff revoked the arbitrator's authority, without any application to postpone that meeting for the purpose of obtaining witnesses in reply to the Defendant's case.

In answer to this the Plaintiff's attorney deposed, that at the last meeting previous to the 8th of *December*, the Plaintiff's counsel stated, that evidence would be adduced to contradict the Defendant's case; that application was afterwards made to six individuals, who were able to give material evidence for the Plaintiff, and to contradict and discredit certain of the Defendant's witnesses; and that in consequence of their refusal to attend the arbitrator, the Plaintiff revoked his authority.

Wilde and *Andrews* Serjts., who shewed cause, contended, that the revocation of the arbitrator's authority was no ground for staying the proceedings, particularly as the order of *Nisi Prius* was not made a rule of Court; *Clapham* v. *Higham*. (*a*)

Taddy urged the *mala fides* of the Plaintiff. It appeared, on his own shewing, that his witnesses had refused to attend the arbitrator, which could only have arisen from their inability to establish his case.

TINDAL C. J. We have every inclination, if we had the power, to make this rule absolute; but we have no power to do so. All who submit to arbitration have the right to revoke the arbitrator's authority before the

(*a*) 1 *Bingh.* 87.

award

award is made. The only way of deterring them, is, by making the order of *Nisi Prius* a rule of Court, when the fear of an attachment may induce them to submit.

1830.

GREEN v. POLE.

Rule discharged.

BOOTH and Another *v.* MIDDLECOAT and Others.

Feb. 12.

DEBT on a bail-bond.

As soon as an appearance had been entered, and before plea pleaded, the attorney of the Defendant *Middlecoat* told the Plaintiffs' attorney that *Middlecoat* was a bankrupt and had obtained his certificate. The Plaintiffs' attorney took no step to discharge *Middlecoat*, who thereupon pleaded his bankruptcy and certificate, and ruled the Plaintiffs to reply; whereupon a replication was filed as to the other Defendants, and a *nolle prosequi* entered as to *Middlecoat*.

One of several Defendants in an action of debt, having pleaded bankruptcy, Plaintiff entered a *nolle prosequi* as to him:

Held, that such Defendant was not entitled to his costs under 8 *Eliz. c.* 2., although before plea the Plaintiff was apprised of the bankruptcy.

Russell Serjt. obtained a rule *nisi* for the Plaintiffs to pay *Middlecoat* his costs of this action under the statute 8 *Eliz. c.* 2. *s.* 2., which gives a defendant his costs in case a plaintiff after declaration suffer a suit to be discontinued, or otherwise be nonsuited in the action.

In the case of *Cooper* v. *Tiffin* (*a*), in which the plaintiff, after declaration, discovering that the defendant was an infant, entered a *nolle prosequi*, the Court on argument said, "That the case of *nolle prosequi* could not be distinguished in reason from that of a discontinuance, for that in this, as well as in that, the party might afterwards commence another action for the same cause; and

(*a*) 3 *T. R.* 511.

1830.

BOOTH v. MIDDLECOAT.

that the practice had been to give costs in such cases." And though in *Harewood* v. *Matthews* (*a*), the Court refused the defendant his costs on a *nolle prosequi*, the plaintiff there had no notice, as in the present case, of the Defendants' non-liability before plea pleaded. In *Jackson* v. *Chambers* (*b*), the defendant was allowed her costs under the statute, 8 *Eliz. c.* 2. *s.* 2., although, upon the argument, *Vaughan* Serjt. cited the case of *Harewood* v. *Matthews*.

Wilde Serjt. shewed cause. A defendant who is discharged neither by discontinuance nor nonsuit, may sometimes be within the equity of the statute; as, if he were never liable to the action; which was the case of the infant in *Cooper* v. *Tiffin*; but if he be *primâ facie* liable, and his plea is a defence arising since he incurred the obligation on which he is sued, he is not entitled to his costs upon a *nolle prosequi*, at least in actions on contract; and *Harewood* v. *Matthews* is in point. Cases in tort are essentially different, because there one joint wrong-doer cannot levy contribution of the others; and this explains the decision in *Jackson* v. *Chambers*, which *Dallas* C. J. distinguished also on another ground from *Harewood* v. *Matthews*.

Russell. In the present case, the Plaintiff having had notice before plea pleaded that the Defendant was not liable, and yet having unnecessarily compelled him to incur the expense of pleading, the case is the same as if the Defendant had never been originally liable.

TINDAL C. J. I think this case is not within the principle of the 8 *Eliz. c.* 2. *s.* 2., which gives a defendant his costs, in case a plaintiff after declaration suffer a suit to be discontinued, or be otherwise nonsuit in the

(*a*) 2 *Tidd*. 981. 9th edit. (*b*) 8 *Taunt*. 643.

action.

1830.

BOOTH v. MIDDLECOAT.

action. It has been said, that in some cases a *nolle prosequi* is within the equity of this statute: that is, where what has been done amounts to a discontinuance or a general nonsuit. We do not impeach the decision of *Jackson* v. *Chambers*, where there were several defendants in trespass, and the one in whose favour a *nolle prosequi* was entered, would have no means of obtaining costs against the others: but we accede to the practice as laid down in *Harewood* v. *Matthews*, and neither on the particular circumstances of the case, nor under the equity of the statute do we think the Defendant entitled to his costs.

PARK J. It is impossible to distinguish *Harewood* v. *Matthews*, which has decided the present case.

Rule discharged.

DOE dem. HOLT and Others v. ROE.

Feb. 12.

ONE *Dally* being indebted to *Rebecca Holt*, the lessor of the Plaintiff, gave her a *cognovit* for 357*l.* 18*s.*, with a stay of execution till *November* 1825.

1. *D.* having given a *cognovit* for 357*l.*, mortgaged certain premises as a security for the payment of that sum, and the costs of the judgment, and all other costs and charges whatsoever attending the same.

The mortgagee having levied execution, her right to the goods seized was disputed in an action at the suit of certain persons, who claimed to be assignees of *D.* under a bankruptcy. The mortgagee failed upon a first trial, but succeeded in a second, *D.* proving not to be bankrupt:

Held, that the mortgagee could not claim from *D.* the costs of this action, as costs or charges attending the judgment confessed by *D.*

2. *D.* having stated at the execution that certain goods levied were not his property, and the sheriff having, by inquisition, ascertained that they were, the mortgagee was holden entitled to claim of *D.* the costs of the inquisition, if she had paid them to the sheriff.

1830.

DOE dem. HOLT v. ROE.

Upon an application for further time to pay, he, by indenture, demised to her the premises sought to be recovered in this ejectment, for ninety-nine years, with a proviso for making void the indenture upon payment of the before-mentioned debt and interest by instalments, without any deduction or abatement whatsoever; the first instalment to be paid in *August* 1826. The indenture also contained a covenant by *Dally*, that, after default made in such payment, it should be lawful for the said *Rebecca Holt* and *Robert Rees* to enter into the said premises and quietly possess and enjoy the same; and for further assurance by *Dally*, it was further declared that it should be lawful for the said *Rebecca Holt* and *Robert Rees* to enter up judgment on the said *cognovit* signed by *Dally*, and that such judgment, when so entered up, should stand and be as a security for payment of the said sum of 357*l.* 18*s.* with interest, and costs; and that in case default should be made in payment of the said sum of 357*l.* 18*s.*, or the interest as aforesaid, or any part thereof as therein mentioned, it should be lawful for the said *Rebecca Holt* and *Robert Rees* to issue execution on the said judgment, and thereunder from time to time to levy, until the whole of the said sum of 357*l.* 18*s.* and interest should be fully paid and satisfied, together with the costs of such judgment, *and all other costs and charges whatsoever attending the same.*

In *October* 1826 (the first instalment due in *August* not having been paid) *Holt* issued a *fi. fa.* under the judgment on the *cognovit*, for 315*l.* 12*s.* 7*d.*, the balance then due to her out of the 357*l.* 18*s.*

The 315*l.* 12*s.* 7*d.* was levied by the sheriff, and paid to *Holt*; but *Dally* having given the sheriff notice that the goods seized belonged jointly to him and one *Deacon*, the sheriff impannelled a jury to determine the question of property, and the expense of that enquiry amounted to 20*l.*

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1830.

DOE dem. HOLT v. ROE.

A commission of bankruptcy having been issued against *Dally* about this time, his assignees sued *Holt* for the money levied on *Dally*'s goods and paid her by the sheriff, and on the trial of the cause a verdict was found for the assignees.

This verdict was set aside on a motion for a new trial, and *Holt*, having taken the record down by proviso to a second trial, a verdict was there given in her favour, and, on a special case, confirmed by the Court of King's Bench, on the ground that *Dally* was not a trader.

The costs of this second trial were paid her by *Dally*'s assignees; but the costs of the first trial, the costs of taking down the record by proviso, and the costs of the enquiry by the sheriff to ascertain whether the goods he had seized belonged to *Dally* or to *Dally* and *Deacon*, amounting altogether to 220*l.*, remained unpaid.

The lessors of the Plaintiff, therefore, commenced this ejectment, considering these as "costs and charges attending the judgment," as a security for which the premises in question had been demised to them by *Dally*.

Wilde Serjt., on the part of *Ridge*, the tenant in possession, who had entered into the consent rule to defend, and to whom *Dally* had conveyed the equity of redemption, obtained a rule *nisi* calling on the lessors of the Plaintiff to stay the proceedings, and assign the premises to *Ridge* at his expense, upon the ground that the judgment under the *cognovit*, and all costs attending it, had been discharged by the levying of the 315*l.* 12*s.* 7*d.*, and the payment of the costs of the second trial in the action brought by *Dally*'s assignees. He contended that the costs of an action brought by strangers, who ultimately appeared to have no valid claim upon the effects of the mortgagor, were no part of the costs

1830.

DOE dem. HOLT v. ROE.

and charges attending the judgment confessed by the mortgagor. The inquisition under the execution upon that judgment was holden by the sheriff for his own safety, and he therefore, not the mortgagor, ought to defray the expense of it.

Taddy Serjt., who shewed cause, urged that the inquisition having been rendered necessary by the mortgagor's asserting that the goods did not belong to him, he was estopped to say that the expenses attending it were not costs attending the judgment he had confessed. So, the action of the assignees was a contest occasioned by the judgment the validity of which the mortgagor was bound to support; the charges of that action, therefore, were charges attending the judgment.

Wilde. The mortgagor having turned out not to be a bankrupt, has no connection with the action of his supposed assignees; they defrayed the costs of the second trial, on which the mortgagee succeeded; it may be presumed, therefore, to have been by her own default that she failed on the first; and, at all events, costs occasioned by her own default cannot be esteemed costs attending the judgment confessed by the mortgagor.

TINDAL C. J. It appears to me that the costs of the action brought by the assignees are not costs secured by the instrument which the mortgagor has executed. That was an action brought by strangers; and if it had been met with a good defence at first, as it was ultimately, the costs now sought would not have been unpaid. The costs of the inquisition may be left to the prothonotary.

GASELEE J. Whatever portion of the costs of the sheriff's inquisition was paid by the lessor of the Plaintiff,

tiff, I think she is now entitled to. If they were defrayed by the sheriff, she cannot claim them.

1830.

Doe dem. HOLT v. ROE.

The rest of the Court concurred.

Rule absolute, upon payment of such portion of the costs of the inquisition, if any, as the prothonotary should think right.

RUTHERFORD *v.* EVANS.

Feb. 12.

THE first count of the declaration stated, That the Plaintiff, for a long time before and at the time of the composing and publishing the false, scandalous, malicious, and defamatory libel by the Defendant thereinafter mentioned, and before and at the time of the committing of the several grievances by the Defendant thereinafter mentioned, carried on the trade and business of a carpenter, builder, and surveyor, and had been appointed the surveyor, agent, and steward, of a certain company or society of persons called the *New England* Company, and in such capacity had been and was employed by the said company, and had always conducted himself with credit, skill, care, punctuality, fidelity, and integrity towards the said company, and all

1. Libel. The declaration alleged, that the Plaintiff had been appointed as surveyor of a company or society, called "The New *England* Company;" and had been employed as such; and that Defendant libelled him in his employment.

Held, that it was not necessary to allege, with extreme precision, the description of the company, or to prove the Plaintiff's appointment, the libel being alleged of the Plaintiff in his employment.

2. The libel charged Plaintiff with being the most artful scoundrel that ever existed, and with being insolvent; but the writer added, that he had never disclosed the matter, nor ever would, except to the person whom he addressed and his friend. This latter assertion was omitted in the declaration: Held, that the omission was not material.

1830.

RUTHERFORD v. EVANS.

others employing him in the way of his said trade and business, and until the committing of the said several grievances by the Defendant thereinafter mentioned, had never been suspected of being guilty of any extravagance or misconduct in his said employment by the said company, or of abusing the trust or confidence reposed in him by the said company in his said employment, or of having made default in payment of the monies due and owing from him to his several creditors, or of being in insolvent circumstances, but was of good name, fame, and credit, and was gaining great profits in his said employment by the said company and by his said trade and business, to the comfortable support of himself and his family, and the great increase of his riches, to wit, at *London*: Yet the Defendant well knowing the premises, but greatly envying the happy state and condition of the said Plaintiff, and contriving and wickedly and maliciously intending to injure the Plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with the said company, and with and amongst his said employers, and all his neighbours and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by the said company, and by and amongst his employers and neighbours and the said subjects, that he had been and was guilty of the offences and misconduct thereinafter mentioned to have been charged upon and imputed to him, and to cause the said company to dismiss and discharge him from their said employment, and thereby to injure him in his said business and employment, and to vex, harass, oppress, impoverish, and wholly ruin him, to wit, on, &c., at, &c., falsely, wickedly, and maliciously did compose and publish, and caused and procured to be published of and concerning the said Plaintiff, and of and concerning his said business and employment

ment by the said company, and of and concerning the Plaintiff in his said trade of carpenter, builder, and surveyor, and of and concerning an alleged default in payment of the monies due and owing from the said Plaintiff to his said several creditors as aforesaid, a certain false, scandalous, malicious, and defamatory libel, in the form of a letter addressed to one *James Gibson*, he the said *James Gibson* then and there being the treasurer of the said company, containing amongst other things the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the Plaintiff, and of and concerning his said business and employment by the said company, and of and concerning his alleged default in payment of the monies due and owing from the said Plaintiff to his said several creditors as aforesaid, that is to say, "I (meaning the said Defendant) should have been silent notwithstanding my anxious desire to put you (meaning the said *James Gibson*) upon your guard against the most artful scoundrel (meaning the Plaintiff) that ever existed: the natural punishment of his extravagance and misconduct is fast approaching, he is in every person's debt, his ruin cannot be long delayed, and he is not deserving of the slightest commiseration."

The libel proved in support of this declaration, was a letter from the Defendant, as follows, addressed to the treasurer of the *New England* Company, by whom the Plaintiff had been employed.

"My dear Sir,

"I was very sorry to find by your letter received today, that you had been so uncomfortably circumstanced respecting the information I gave you previously to your leaving *Eveswell*. I fully expected our friend would have seen you soon after, or I should have been silent notwithstanding my anxious desire to put you upon your

1830.

RUTHERFORD v. EVANS.

your guard against the most artful scoundrel that ever existed. The natural punishment of his extravagance and misconduct is fast approaching: he is in every person's debt. His ruin cannot be long delayed; and he is not deserving of the slightest commiseration. But it is my most anxious request that this fellow's misconduct may not entail ruin in another quarter. Were I to be the cause of such disaster and destruction to so many that are innocent, I could never forgive myself; and I pledge my sacred word of honor that, excepting to you and to our friend, I have never disclosed the affair, nor ever will. If you can inform me when our friend is to be in *London*, I will meet him, as I had much rather we talk the subject over before any steps are taken.

"I am, &c.

"*Everwell*, 24th *October*, 1827. "E. EVANS."

The Plaintiff was turned out of his employment, and commenced this action.

At the trial before *Tindal* C. J., *London* sittings after *Trinity* term, the name of the company, which was a corporate body, commonly called "the *New England* Company," turned out to be, not "the *New England* Company," but "A Company for estabishing Christianity in *New England* and the parts adjacent in *America*." And the Plaintiff's appointment as agent and surveyor to the company was not by deed.

It was objected, that the company had not been truly described in the declaration; that the Plaintiff had not proved any appointment, inasmuch as appointments by a corporation ought, with few exceptions, to be by deed; and that the letter complained of had not been truly set out in the declaration.

A verdict, however, was taken for the Plaintiff, subject to a motion on these points.

Taddy

1830.

RUTHERFORD v. EVANS.

Taddy Serjt. accordingly moved in *Michaelmas* term to set aside the verdict, and enter a nonsuit on the foregoing objections.

With regard to the appointment, he cited *Randle* v. *Deane* (*a*), to shew that, except for inferior purposes, as cooking and the like, an officer of a corporation could only be appointed by deed; and proof of the appointment was material to the Plaintiff's case, his dismissal being the principal ground of action. In *Moises* v. *Thornton* (*b*), where the defendant slandered the plaintiff by saying, "If Dr. *Moises* shews you a diploma, it is a forgery," it was holden, that the production of the diploma was not sufficient to shew that the plaintiff was entitled to the degree of doctor of physic. And in *Smith* v. *Taylor* (*c*), which was an action for slandering the plaintiff in his practice as a physician, *Rooke* J. and *Chambre* thought he could not recover unless he shewed himself to be a physician duly appointed. With respect to the libel itself, the variance was fatal, the part of the letter omitted having the effect of qualifying the whole, and shewing, at least, that it was a confidential communication. A rule *nisi* having been granted,

Wilde and *Storks* Serjts. shewed cause. If the Plaintiff had undertaken to state any deed or contract of the corporation, he might perhaps have been called on to describe the name of the corporation with precision; but when the suit does not concern any contract, and the society is only incidentally mentioned, it is sufficient to describe them by the name by which they are generally known, otherwise the Plaintiff might be placed unnecessarily under insuperable difficulties. With regard to the appointment, it may be contended that the Plaintiff's office was one of those to

(*a*) 2 *Lutw.* 1497. (*b*) 8 *T. R.* 303. (*c*) 1 *N. R.* 210.

which

1830.

RUTHERFORD v. EVANS.

which a corporation may appoint without a deed, because it neither vests nor devests any interest, *Anon.* (*a*); but the mode of appointment was immaterial, for the libel is not concerning the appointment of the Plaintiff, but his employment; and the fact of the employment being out of dispute, if the Defendant were deprived of that by reason of the libel, every material allegation in the declaration is proved. The portion of the letter omitted in the declaration by no means qualifies or alters the nature of the libellous extract set out; and the rule is clear, that unless the part omitted alter the nature of the libel it need not be set out. *Cartwright* v. *Wright* (*b*), *Tabart* v. *Tipper*. (*c*)

Taddy, (and *Merewether* Serjt. was with him,) *contrà*. The objection with respect to the description of the company is, not that the mere name has been misstated, but that the company has been described as a private society, rather than as a corporate body, so that the proof did not correspond with the description. The Plaintiff was never employed by a private society such as that described. Then, the portion of the letter not set out was most material to the construction of the whole, as shewing that the communication was made in confidence, and not with any design to injure the Plaintiff. In *Tabart* v. *Tipper*, the passage omitted was an aggravation, not a mitigation of the libellous charge.

Cur. adv. vult.

TINDAL C. J. This was an action on the case for a libel, in which the Plaintiff stated in the first count of his declaration, that, before and at the time of the publication of the libel, he carried on the trade and business of a carpenter, builder, and surveyor, and had been ap-

(*a*) 1 *Salk.* 191. (*b*) 5 *B.* & *A.* 615. (*c*) 1 *Campb.* 350.

pointed

pointed the surveyor, agent, and steward of a certain company or society of persons called the *New England* Company, and in such capacity had been and was employed by the said company; and he then alleged, that the Defendant, intending to cause the said company to dismiss and discharge the said Plaintiff from his said employment, &c., published the libel in question of and concerning the said Plaintiff, and of and concerning his said business and employment by the said company, in the form of a letter addressed to the treasurer of the said company, containing the libellous matter following of and concerning the said Plaintiff, and of and concerning the said business and employment by the said company; which libel is then set out in the declaration.

Three objections were taken at the trial: first, that the Plaintiff had failed in proving the inducement to his declaration, for that the proper name of incorporation of the company was not simply the *New England* Company, but "A Company for establishing Christianity in *New England* and the parts adjacent in *America*:" the second, that as the Plaintiff alleged an appointment by the company, as surveyor, agent, and steward of the company, he was bound to shew an appointment by deed under their common seal: and the third objection was upon the ground of a variance from the libel as set out in the declaration, and as proved in evidence.

With respect to the first objection, however, we are of opinion that, as it was proved by the Plaintiff that the company was commonly known and designated by the name of the *New England* Company, it was a sufficient description in this case. It is not an allegation of any right to land or other property, either conveyed to or derived from the company, or of any deed under their common seal; in which case a description by their name of incorporation would undoubtedly have been necessary to enable them to take, to grant, or to charge.

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1830.

RUTHERFORD v. EVANS.

It is only an allegation of an employment by a company, called the *New England* Company; and as there was sufficient evidence that the company in question was generally known by that description, we think it sufficient in this action, which is brought for a purpose collateral to any right belonging to the company itself.

As to the second objection, it is to be observed that the inducement states, as separate facts, and as distinct allegations, "that the Plaintiff had been appointed the surveyor, agent, and steward of the company," and "that in such capacity he had been and was employed by the said company;" so that the allegation of the appointment and the employment stand distinct from each other. And it further appears, that in the averment of the Defendant's intention, and also of the application of the libel, the reference is made not to the appointment of the Plaintiff to his office, but solely to his employment in that capacity. Even if the declaration had alleged the libel to have been published of and concerning the appointment and also the employment, it would have been difficult to have contended after the decided cases on this point (*a*), that the evidence as to the employment alone would have been sufficient to support the action; but severed as these allegations are, and confined as the libel is to the Plaintiff's employment only, we think it unnecessary to prove any actual appointment of the Plaintiff to the office in question either by deed or otherwise.

As to the third objection, we take the rule to be as it is laid down in the books — that if the omission of any part makes a material alteration in the sense of the part inserted, such omission is fatal. And if in this case the part of the letter which had been omitted had contained

(*a*) See *Figgins* v. *Cogswell*, 3 *M.* & *S.* 369. and *May* v. *Brown*, 3 *B.* & *C.* 113.

any

any qualification of the meaning of the part set out, or if any real substantial difference of construction would have arisen upon the whole of the letter when set out on the record, we should have held the omission of such part constituted a variance which might be taken advantage of by the Defendant. But, upon the consideration of the whole letter, it appears to us that the charge imputed by it remains precisely the same as that which is contained in the part set out. The previous part of the letter, which is omitted, merely assigns the Defendant's reason for writing the letter: it has no bearing whatever upon the nature of the imputation, nor does it in any degree alter its quality or effect. If the setting out the whole letter would have enabled the Defendant to have moved in arrest of judgment, no doubt the omission of any part would have been a fatal variance. But we think, the very same libel appears from the perusal of the whole as from the part; and the consequence is, that although the Defendant might undoubtedly avail himself of the whole of the letter as evidence for the jury to infer the want of malice in the Defendant, as was done at the trial, still the omission of such part cannot be considered as a ground of variance. We therefore think, the rule should be discharged.

Rule discharged.

1830.

Feb. 12.

GODEFROY *v.* DALTON, Gent.

An attorney, with the advice of counsel, produced, in an action against *J. B.* for negligence in the conduct of Plaintiff's defence to another action, the prothonotary's book to prove an allegation, "that in consequence of the negligence of *J. B.* judgment by default had been signed, and such further proceedings had, that final judgment was afterwards signed and execution issued;" whereupon, Plaintiff was nonsuited for not producing the record of that judgment or a proper copy: Held, that this was not such negligence as rendered the attorney liable to an action.

THE first count of the declaration stated, That whereas before the making of the promise and undertaking of the Defendant thereinafter next mentioned, a certain action had been commenced and prosecuted by and at the suit of *Stephen Dubois* against the Plaintiff in the court of our lord the king, before the Justices of our lord the king of the Bench at *Westminster*, in the county of *Middlesex*, for a certain cause of action alleged to have accrued to the said *Stephen Dubois* against the Plaintiff, and the Plaintiff had retained and employed one *Cyrus Jay* and *Mather Byles* as his attornies, for certain fee and reward to be paid to them by the Plaintiff in that behalf (they the said *Cyrus Jay* and *Mather Byles* then and there being attornies of the said Court of our said lord the king of the Bench at *Westminster* aforesaid) to defend the said action for the Plaintiff, and the said *Cyrus Jay* and *Mather Byles* had undertaken such defence for the Plaintiff, and such proceedings were thereupon had in the same Court in the said action, that it was considered and adjudged by the said Court, that the said *Stephen Dubois* should recover against the the Plaintiff the sum of 30*l.* 10*s.* of lawful money of *Great Britain*, which said sum of 30*l.* 10*s.* the Plaintiff had been forced and obliged to pay and had paid to the said *Stephen Dubois* in satisfaction of the said judgment, and had been desirous of commencing and prosecuting a certain action against the said *Cyrus Jay* and *Mather Byles* for negligence in conducting his said defence and for the recovery of the said sum of 30*l.* 10*s.* so paid to the said

said *Stephen Dubois* as aforesaid; of all which said several premises the said Defendant, before the making of his said promise and undertaking thereafter next mentioned, had notice, to wit, at, &c., and thereupon, theretofore, to wit, on, &c., at, &c., in consideration that the Plaintiff, at the special instance and request of the Defendant, would retain and employ the Defendant as his attorney for certain fee and reward to be thereupon paid by the Plaintiff to the Defendant in that behalf, to prosecute and conduct the said action of the Plaintiff against the said *Cyrus Jay* and *Mather Byles*, the Defendant undertook and then and there faithfully promised the Plaintiff to prosecute and conduct the said last mentioned action, in a proper, skilful, and diligent manner: and the Plaintiff confiding in the said promise and undertaking of the Defendant, and in hopes of his faithful performance thereof, did afterwards, to wit, on, &c., at, &c., retain and employ the Defendant as such attorney as aforesaid, to prosecute and conduct the said last-mentioned action on the terms aforesaid; and the Defendant then and there accepted the said retainer and employment, and under and by virtue thereof, afterwards, to wit, in *Trinity* term in the seventh year of the reign of our said lord the king, as the attorney of and for the said Plaintiff, commenced an action at the suit of the Plaintiff against the said *Cyrus Jay* and *Mather Byles* in the said Court of our said lord the king, before the Justices of our said lord the king of the Bench at *Westminster*, for the purpose aforesaid: and afterwards, to wit, on, &c., at, &c., the said *Cyrus Jay* and *Mather Byles* appeared and pleaded to the said action, and issue was joined thereupon: and afterwards, to wit, on, &., at, &c., the said last-mentioned cause came on for trial in the said Court of our said lord the king of the Bench, before Sir *James Burrough*, Knight, in the absence of the Right Honorable Sir *William Draper Best*, Knight, his Majesty's Chief Justice of the said Court of the

1830.

GODEFROY v. DALTON.

Bench, he, the said Sir *James Burrough*, being then and there one of the Justices of the Bench, and was then and there tried before the said Sir *James Burrough*; and, although it was then and there the duty of the Defendant under and by virtue of his said retainer, and his said promise and undertaking, to have had in the said Court of our said lord the king of the Bench at the trial of the said last-mentioned action, evidence of the said judgment in the said first-mentioned action against the Plaintiff at the suit of the said *Stephen Dubois*, in order that it might then and there have appeared to the said Court of our said lord the king of the Bench, that judgment had been obtained by the said *Stephen Dubois* against the said Plaintiff in the said first-mentioned action for the said sum of 30*l.* 10*s.*, whereof the Defendant had notice, nevertheless, the Defendant, not regarding his said promise and undertaking, but contriving, and fraudulently intending, to injure the said Plaintiff in this respect, did not nor would prosecute the said last-mentioned action in a proper, skilful, and diligent manner, but on the contrary thereof wholly neglected and omitted to have proper evidence of the said judgment in the said first-mentioned action ready to produce to the said Court of our said lord the king of the Bench; by reason whereof, the Plaintiff was then and there wholly unable to prosecute his said action against the said *Cyrus Jay* and *Mather Byles* with effect, and was then and there compelled to suffer himself to be nonsuited in the said last-mentioned action, whereby he was not only hindered and prevented from recovering from the said *Cyrus Jay* and *Mather Byles* the said sum of 30*l.* 10*s.* so paid to the said *Stephen Dubois* as aforesaid, in satisfaction of his said judgment, but had also been forced and obliged to pay and had paid to the said *Cyrus Jay* and *Mather Byles* a large sum of money, to wit, the sum of 100*l.* for their costs and charges in and about their defence to the said last-mentioned action;

1830.

GODEFROY v. DALTON.

action; and had also been forced and obliged to incur a further great expense, amounting in the whole to 100*l.*, in and about re-commencing and prosecuting his said action against the said *Cyrus Jay* and *Mather Byles*, to wit, at," &c.

The present action was brought by the Plaintiff against the Defendant, as an attorney of this Court, for negligence in the conduct and prosecution of a former action brought by the same Plaintiff against *Cyrus Jay* and his partner.

The action against *Jay* and his partner had been brought against them for negligence, as attornies, in conducting the defence of the present Plaintiff in a former action, which had been brought against him by one *Dubois:* and in the action against *Jay* and his partner, the declaration alleged that, by reason and in consequence of the negligence of *Jay* and his partner, judgment by default had been signed, and such further proceedings had, that final judgment was afterwards signed, and execution issued against *Godefroy.*

Upon the trial of *Godefroy* v. *Jay and Another*, before *Burrough* J., the only evidence which the present Defendant had procured to satisfy that allegation was the book of the prothonotary of this Court, in which was kept an entry of the judgments by default, signed in each term, with the date, and the officer's fees opposite to the same; and the learned Judge who tried that cause, held this proof of the allegation not to be sufficient, and nonsuited the plaintiff; which judgment of nonsuit was afterwards confirmed by this Court on a motion to set aside the same. It was for the negligence on the part of *Dalton*, as the Plaintiff's attorney, in not having provided himself with the proper evidence of the judgment as set out in the declaration against *Jay* and his partner, that the present action was brought.

It was proved, by a gentleman at the bar, of great

1830.

GODEFROY v. DALTON.

experience and skill, that, upon the particular allegation in that declaration against *Jay* and his partner, he thought, at the time, the evidence offered was sufficient; for that it seemed to him that negligence was the gist of the action, and that the judgment was only alleged as the consequence. But it appeared that the Defendant *Dalton* had consulted this gentleman just before the trial of *Godefroy* v. *Jay and Another* was called on, and it was not shewn that he had ever searched to find whether final judgment had been entered up or not in the cause of *Dubois* v. *Godefroy*.

At the trial of the present cause before *Tindal* C. J., *Middlesex* sittings after last *Trinity* term, a verdict was taken for the Plaintiff, subject to a motion to this Court to set it aside, and enter a nonsuit or arrest the judgment. Accordingly,

Taddy Serjt. in *Michaelmas* term obtained a rule *nisi* to that effect, on the ground that the Defendant in the exercise of his profession was liable only for the consequences of gross negligence, and not for a mere error in judgment; for which he cited *Pitt* v. *Yalden* (*a*), where Lord *Mansfield* had placed the question of professional responsibility on that footing; and he contended that nothing more than an excusable error in judgment had been proved against the Defendant. An arrest of judgment was moved for on the ground that the record nowhere alleged the Plaintiff to have had a good cause of action against *Jay* and *Byles*, or that *Dubois* had originally no cause of action against the Plaintiff; and unless he had a good cause of action against them, as having been injured by the judgment suffered to *Dubois*, he could not recover against the present Defendant; but as the Court came to no decision on this point, the argument upon it is here omitted.

(*a*) 4 *Burr.* 2060.

Wilde

1830.
GODEFROY v. DALTON.

Wilde and *Bompas* Serjts. shewed cause. It may be admitted that an attorney is not liable, if he errs in judgment upon a point of doubt or difficulty; but he is responsible for the consequence of not being reasonably versed in his business, and for neglect in the conduct of it. And where gross ignorance is proved, it is no answer for the defendant to say he consulted another, for he is bound to possess reasonable skill in his business, and he cannot shift his own responsibility.

The ignorance by which the plaintiff has suffered was in a matter of every-day practice. The declaration had alleged that a judgment had been obtained against the Plaintiff through the negligence of *Jay* and *Byles*; unless that judgment were proved to exist the Plaintiff had no cause of action against *Jay* and *Byles*. But it is among the first elements of legal knowledge and practice that a final judgment ought to be proved by the production of the record or an office copy; and the Defendant ought at least to have ascertained whether or not the final judgment existed, and to have consulted his counsel before the very eve of the trial.

Taddy and *Cross* Serjts. *contrà*. The gist of the Plaintiff's charge against *Jay* and *Byles* was, that through their negligence judgment by default had been signed against him; the final judgment was only alleged as a consequence of that negligence. The Defendant *Dalton*, therefore, might be excused for supposing, sanctioned as he was by counsel, that the interlocutory judgment was all he would be called on to prove; and of that, till the Court had decided otherwise, the prothonotary's book might be thought good, if not the best evidence. Gross negligence in an attorney, can only be of that which is his immediate duty, uncorrected by superior advice, — as, an omission in the stating an abstract; but this was a case of novelty in which the Defendant might well seek for assistance, and might well stand excused

1830.

GODEFROY v. DALTON.

where one of higher attainments had fallen into error. In *Compton* v. *Chandless* (*a*), *Le Blanc* J. said, "That it was not every neglect that would subject a man to such an action; that an attorney was only bound to use reasonable care and skill in managing the business of his client; that if he were liable further, no man would venture to act in that capacity:" which was confirmed by Lord *Ellenborough* in *Baikie* v. *Chandless* (*b*), who said, that "An attorney is only liable for *crassa negligentia*; and it is impossible to impute that to the defendant for not discovering a defect in the memorial of an annuity, which was subsequently held to be a defect upon a very doubtful construction of the statute. I perfectly agree in the observations made on a similar occasion by my brother *Le Blanc*; and I am of opinion that the present action cannot be maintained."

Cur. adv. vult.

TINDAL C. J. In this case the Defendant obtained a rule to shew cause why the verdict for the Plaintiff should not be set aside, and a nonsuit be entered, or, why the judgment should not be arrested: but as the opinion which the Court has formed upon the first branch of the rule, involves the whole merits of the action, it becomes unnecessary to discuss the objection which is supposed to exist upon the record.

It was an action of assumpsit brought by the Plaintiff against the Defendant, as an attorney of this Court, for negligence in the conduct and prosecution of a former action brought by the same Plaintiff against one *Cyrus Jay* and his partner; and the undertaking of the Defendant is stated to be, "That he would conduct and prosecute the said action in a proper, skilful, and diligent manner." The question, therefore, upon the first branch of the rule is, Whether, upon the evidence, the

(*a*) Cited in *Baikie* v. *Chandless*, 3 *Campb.* 19.
(*b*) 3 *Campb.* 19.

Defendant

Defendant was shewed to have failed in bringing sufficient skill and diligence to the conduct of such former cause.

Now, the action against Mr. *Jay* and his partner, had been brought against them for negligence, as attornies, in conducting the defence of the present Plaintiff in a former action which had been brought against him by one *Dubois*; in which action against *Jay* and his partner it was alleged, that by reason and in consequence of the negligence of the attornies, judgment by default had been signed, and such further proceedings had, that final judgment was afterwards signed and execution issued against *Godefroy*.

Upon the trial of *Godefroy* v. *Jay and Another*, before Mr. Justice *Burrough*, the only evidence which Mr. *Dalton*, the present Defendant, had procured to satisfy that allegation, was the book of the prothonotary of this court, in which was kept an entry of the judgments by default signed in each term, with the date and the officer's fee opposite to the same; and the learned Judge who tried that cause, held this proof of the allegation not to be sufficient, and nonsuited the plaintiff, which judgment of nonsuit was afterwards confirmed by this Court on a motion to set aside the same.

It was for the negligence on the part of *Dalton*, as the Plaintiff's attorney, in not having provided himself with the proper evidence of that judgment as set out in the declaration, that the present action was brought; and the question is, Whether this amounts to such want of skill and diligence in his profession of an attorney, as to render him liable to the present action.

It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia*, or

1830.

GODEFROY v. DALTON.

lata culpa mentioned in some of the cases, for which he is undoubtedly responsible.

The cases, however, which have been cited and commented on at the bar, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses: and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law.

Looking, then, at the particular circumstances attending the failure of the action of *Godfroy* v. *Jay and Another*, it appears, in the first place, that this was not the ordinary case of a direct allegation of a judgment on record, with a plea distinctly putting that judgment in issue; in which case of ordinary and daily occurrence, a neglect in the attorney to provide himself with regular proof of the judgment on record would have classed itself within the description of gross negligence. There is an ambiguity in the statement of the final judgment, which would lead a person not well versed in the practice of pleading to suppose that it was only alleged as a consequential damage, and not as a direct ground of action; and in the former case, the failure of producing the record would not have gone to the maintenance of the action. But looking more particularly to the evidence in the case, it appears to have been proved by a gentleman at the bar of great experience and skill, that upon the particular allegation he thought at the time the evidence offered was evidence sufficient, for that it seemed to him that negligence was the gist of the

1830.

GODEFROY v. DALTON.

the action, and that the judgment was only alleged as the consequence.

We lay no stress upon the fact, that the attorney had consulted his counsel as to the sufficiency of the evidence; because, we think, his liability must depend upon the nature and description of the mistake or want of skill which has been shewn; and he cannot shift from himself such responsibility by consulting another where the law would presume him to have the knowledge himself. But it is from the particular nature of this misconception of the attorney, and from the evidence given in the cause, that we think the non-production of a record of judgment is not to be considered as an instance of such gross negligence as makes the Defendant answerable; and we therefore think, the rule for a nonsuit ought to be made absolute.

Rule absolute.

DOE dem. CARTHEW and Others *v.* BRENTON.

Feb. 12.

IN 1825 the lessors of the Plaintiff brought an ejectment in the Court of King's Bench for the recovery of certain land, and part of a mine and buildings called the *East Crinnis* mine, in the parish of *St. Blazey*, in *Cornwall*.

The Defendant appeared, and defended for the mines and buildings only, and judgment was had for the land; but, by a rule of K. B., *Michaelmas* term 1825, it was ordered that in executing the writ of possession for the land, the lessors of the Plaintiff should be restrained from disturbing the Defendant in the possession of the mines and buildings in question, and in the use of the lands, so far as the same was necessary for working the mines.

The lessor of the Plaintiff having brought three ejectments in the Court of K. B. for the same property, that Court staid the proceedings in two, and compelled the Plaintiff to confine himself to one, upon certain terms which rendered it probable that

in the event he would have to pay the costs; whereupon he brought an ejectment for the same property in this Court. Proceedings therein were staid.

After

1830.

DOE dem. CARTHEW v. BRENTON.

After various intermediate proceedings relating to the same property, the ejectment not having been tried, the lessors of the Plaintiff, in *Hilary* term 1829, obtained a rule *nisi* in K. B. to rescind the rule of *Michaelmas* term 1825, and to issue execution in the ordinary form.

This rule of *Hilary* 1829, was discharged on the following terms: that if the lessors of the Plaintiff obtained the verdict, or the Defendant obtained the verdict on the ground only of the leave and license of the tenant of the land, failing to prove a right of entry to erect the buildings independent of such leave, in either case it was to be referred to an arbitrator to say what compensation ought to be made to the lessors of the Plaintiff, in the first case, for the entry and working of the mines without the consent of the owner and occupier of the land, and in the second, for such entry and working, as an alleged injury to the reversion, if the reversioner could by law recover such compensation.

But between *Easter* and *Trinity* terms last, the lessors of the Plaintiff having brought two fresh ejectments in the King's Bench for the same property, one, on the demise of *Carthew* alone, another on a joint demise, a rule *nisi* was obtained in that Court, calling on the lessors of the Plaintiff to shew cause why they should not elect to proceed in one of the said three causes; and in case they should elect to proceed in either of the two last causes, then why the first cause should not be discontinued, and the costs of the Defendant therein be paid by the lessors of the Plaintiff; and, if they should elect to proceed in the first-mentioned cause, why the proceedings in the two last-mentioned causes should not be stayed.

On shewing cause against the said last-mentioned rule on the 6th of *July* last, it was alleged by *Carthew*, and sworn on his part, that the said first-mentioned action had been brought for the purpose of trying whether his present Majesty, as Duke of *Cornwall*, and

1830.

DOE dem. CARTHEW v. BRENTON.

and those claiming under him, had a right to enter upon certain lands situate and being in a certain conventionary tenement within the manor of *Tewington*, parcel of the possessions of the said Duke of *Cornwall*, and work the minerals there; that the said Defendant, *William Brenton*, who claimed such right under the said Duke of *Cornwall*, did not merely intend, on the trial of such ejectment, to confine himself to the trial of such right, but also meant to rely, by way of defence, on a leave and licence to enter on the said lands granted by the tenants of the said *Carthew*, *John Yeoman*, *Peter Yeoman*, and *William Yeoman*, the other lessors of the Plaintiff in the action; that if such defence were set up in the first-mentioned action, and were to be successful, the consequence would be, that the first-mentioned action would be defeated, and *Carthew* be prevented from recovering therein, although he should satisfactorily establish on the trial of the said cause that the said right of entry was not in the Duke of *Cornwall*, or those claiming under him; that, in order therefore, to put an end to such objection and defence, he, *Carthew*, and his tenants, had, subsequently to *Easter* term last, revoked such leave and licence, if any such existed, and had brought fresh ejectments on new demises; that he was willing to consent to a stay of the proceedings in the said last-mentioned actions, provided he were allowed to amend his declaration in the first action without payment of costs.

On the 8th *July* last, Lord *Tenterden* C. J. delivered the judgment of the Court of King's Bench, and it was thereupon ordered,

That the lessors of the Plaintiff in the first action should be at liberty to add another count to the declaration, laying the demise on a later day, and the record in such action should be amended, so as to make it consistent with the day of the demise; and, that the Defendant should plead, so as to take the cause down

1830.

Doe dem. CARTHEW v. BRENTON.

down for trial at the next assizes; that a rule for changing the venue to the county of *Somerset*, and the former rule of reference, should stand; and if the lessors of the Plaintiff should recover a verdict upon the new demise, they should be entitled to have a writ of possession, and recover possession of the premises; and if the Defendant should obtain a verdict on the original declaration, he should have the costs of the action; and that upon the above terms, the proceedings in the two last actions should be stayed.

These terms were indorsed by the counsel on their briefs respectively.

The trial had been appointed to take place in *Somersetshire*, upon a suggestion that it would be difficult to obtain in *Cornwall* an impartial jury on the matter in dispute. The witnesses were accordingly in attendance at the last *Somersetshire* assizes, but the trial of the cause was put off in consequence of the illness of the Judge. The costs incurred, however, by all these proceedings were enormous; and now,

The lessors of the Plaintiff commenced another ejectment in this Court for the recovery of the same property; whereupon,

Wilde Serjt. upon affidavit of the foregoing facts, obtained a rule *nisi* to stay the proceedings; against which

Ludlow and *Merewether* Serjts shewed cause.

This is a motion of the first impression, at least in this Court; and the utmost that can be required is, that the lessors of the Plaintiff shall be put to their election as to which cause they will proceed with. It would be a great hardship to refuse them the opportunity of trying their rightful claim till they have discharged heavy costs which have been occasioned by the Defendant's raising an issue foreign to the merits of the title. As it

is

1830.

DOE dem. CARTHEW v. BRENTON]

is now proposed to try the merits of that title, the present ejectment is a proceeding in a matter altogether different from the former, which would decide only a question of licence. In *Chatfield* v. *Souter* (*a*) this Court refused to stay the proceedings in a writ of right on the ground that the costs of an ejectment for the same property had not been paid, because the ejectment could not decide the merits of the demandant's title; and though in *Doe d. Walker* v. *Stevenson* (*b*) this Court stayed the proceedings of the lessor of the Plaintiff till he had paid the costs of an ejectment in which there had been a verdict against him as defendant, yet in a note to that case the learned reporter says, "The practice of the two Courts, as to staying proceedings in other actions by the same plaintiff for the same cause, seems to differ thus far, that the Court of K. B. stays proceedings till the costs of the former action are paid, wherever the plaintiff's proceedings appear to be vexatious; but the Court of C. B. never interferes unless the merits of the case have been tried in the former action. See *Weston* v. *Withers*, 2 *T. R.* 511. *Moulton q. t.* v. *Bingham*, and *Baldwin* v. *Richards*, 2 *T. R.* 511. n. for the practice of K. B.; and *Cox* v. *Chubb*, 2 *Bl.* 809., and *Cooke* v. *Dobree*, 1 *H. Bl.* 10. for the practice of C. B.; also *Hullock's Law of Costs*, p. 463 to 467."

The merits not having been disposed of in the present case, the Court will decline to interfere.

Wilde was stopped by the Court.

TINDAL C. J. By this ejectment, the lessors of the Plaintiff seek to recover property for which they have already brought three ejectments in another court: and if the proposition went no further, there would be sufficient ground for not permitting them to proceed while

(*a*) 3 *Bingh.* 167. (*b*) 3 *B. & P.* 22.

they

1830.

DOE dem. CARTHEW v. BRENTON.

they have another suit for the same cause in another court, and that suit has been specially appointed for trial in an adjoining county. But it does not rest on that; for a rule relating to those ejectments has been obtained in the Court of King's Bench, and assented to by the counsel for the lessors of the Plaintiff, which gives certain rights on both sides; and we are called on to deprive the Defendant of the rights acquired under that rule by permitting the lessors of the Plaintiff to elude it by the mere formality of commencing a fresh action in this court. As to election, the parties made their election upon the drawing up of that rule; and though it is said that this action is not brought for the same cause as the first ejectment, because licence only was put in issue there, yet it is not pretended that the action is not brought for the same cause as the second ejectment in which the Court of King's Bench has stayed the proceedings. As the parties have decided for themselves by electing to go to trial in the first ejectment upon the terms proposed by that Court, we should not do justice if we did not stay the proceedings here.

PARK J. I heartily concur in what has been said by my Lord, and never saw so clear a case.

GASELEE J. declined to take any part, having been concerned in the cause while at the bar.

BOSANQUET J. The object of this ejectment is to defeat the rule which has been consented to in the Court of King's Bench. The proceedings in ejectment being fictitious, are peculiarly under the controul of the Court, and the object of this action being to defeat an arrangement which the lessors of the Plaintiff have assented to in another court, we are justified in interfering.

Rule absolute without costs.

1830.

IN THE HOUSE OF LORDS.

DENN dem. NOWELL *v.* ROAKE.

Feb. 16.

THIS cause having been removed by a writ of error from the Court of Common Pleas to the Court of King's Bench, and thence to the House of Lords, the opinion of all the Judges (*a*) was now delivered by

ALEXANDER C. B. My Lords, — There is no difference of opinion among the Judges in this cause.

The question which they have had to consider in pursuance of your Lordships' order, is expressed in these words: —

Whether, upon the facts stated in the special verdict in this case, the will of *Sarah Trymmer* operated as an execution of the power of appointment of that moiety of the tenements in *Surrey*, of which she was tenant for life, with the power of appointment stated in the special verdict.

The facts stated in the special verdict, which it is material to recollect, are these: — In the year 1749, estates, one moiety of which is now in question, upon the death of their father, *Miles Poole*, descended upon *Sarah* the wife of *Thomas Scott*, and *Elizabeth* the wife of *Henry Roake*, who were his daughters and co-heirs, validly settled to the following uses: one full undivided moiety to the use of *Thomas Scott* for life; the remainder to the use of *Sarah Scott* his wife for life; remainder to the use of such person or persons, and for such estate

Where *A. B.*, seised in fee of one moiety of certain premises in the county of *S.*, and tenant for life, with power of appointment by deed or will, of the other moiety, devised as follows: — "I give and devise all my freehold estates in *L.* and county of *S.*, or elsewhere, to my nephew *J. R.* for life, on condition that, out of the rents thereof, he do from time to time keep such estates in repair;"—Held, that this did not operate as an execution of the power, but passed that moiety only of which testator was seised in fee.

(*a*) For the case at length, and arguments, see 5 *B.* & *C.* 720. 2 *Bingh.* 497.

and

1830.

DENN dem. NOWELL v. ROAKE.

and estates, as the said *Sarah Scott*, whether covert or sole, should by any deed or writing under her hand and seal, to be sealed and executed in the presence of three or more credible witnesses, with or without power of revocation, or by her last will and testament in writing, or any writing purporting to be her last will and testament, to be by her subscribed and published in the presence of three or more credible witnesses, from time to time limit, direct, or appoint; and for want of appointment, to the use of the children of that marriage; and in default of issue, this moiety was limited to *Elizabeth Roake* for her life, with limitations to her family analogous to those which I have mentioned respecting *Sarah Scott* and her family.

The other undivided moiety was limited for the use of *Eliz. Roake* for life, subject to limitations exactly of the same nature and description with those I have already mentioned as to the preceding moiety. It is unnecessary to detail them. *Sarah Scott* survived her first husband, *Thomas Scott*, and afterwards intermarried with one *John Trymmer*, whom she also survived.

She became a widow the second time in 1766. In 1775 she purchased the other undivided moiety from the family of *Roake*. By deeds dated in that year, that moiety was conveyed to make a tenant to precipe, in order to the suffering of a common recovery, which recovery it was declared should enure to the use of *Henry Roake* for life, with remainder to *Sarah Trymmer*, the widow, in fee. *Henry Roake* died in 1777, and by his death *Sarah Trymmer* came into the possession of that undivided moiety. From this time, therefore, to the time of her death, she had the absolute and entire interest in that undivided moiety of the estate which had been originally by the deeds of 1750 limited to the family of *Roake*; and as to her own moiety, her first husband,

husband, *Thomas Scott*, being dead, she was tenant for life of it, with power of appointment or authority before particularly stated, and in default of appointment the estates stood limited to the several uses I have also before stated.

1830.

DENN dem. NOWELL v. ROAKE.

Such were the rights, interests, and authorities which were vested in *Sarah Trymmer* when she made the will to which the question put by your Lordships refers.

That will is dated on the 6th of *June* 1783, has all the solemnities required by the deed of 1750, creating the power, and is, so far as respects this subject, in the following words: — "I hereby give and devise all my freehold estates in the city of *London* and county of *Surrey*, or elsewhere, to my nephew *John Roake*, for his life, on condition that out of the rents thereof, he do from time to time keep such estates in proper and tenantable repair; and on the decease of my said nephew *John Roake*, I devise all my estates, subject to and chargeable with the payment of 80*l.* a year to *Ann*, the wife of the said *John Roake*, for her life, by even quarterly payments to and among his children lawfully begotten, equally, at the age of twenty-one, and their heirs as tenants in common; but if only one child should live to attain such age, to him or her, or his or her heirs, at his or her age of twenty-one. And in case my said nephew *John Roake*, should die without issue, or such lawful issue should die before twenty-one, then I devise all the said estates, chargeable with such annuity of 80*l.* a year to the said *Ann Roake* for her life in manner aforesaid, to and among my nephews and nieces *Miles*, *Thomas*, *John*, *James*, and *Sarah Pinfold*, and *Susanah Longman*, or such of them as shall be then living, and their heirs and assigns for ever."

My Lords, we are of opinion that this devise is not an execution of the authority given to *Sarah Trymmer*

1830.

DENN dem. NOWELL v. ROAKE.

by the settlement of 1750. There are many cases upon this subject, and there is hardly any subject upon which the principles appear to have been stated with more uniformity, or acted upon with more constancy. They begin with Sir *Edward Clere*'s case, in the reign of Queen *Elizabeth*, to be found in the sixth report, and are continued down to the present time; and I may venture to say, that in no instance has a power or authority been considered as executed unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person entrusted with the power would have been ineffectual — would have had nothing to operate upon, except it were considered as an execution of such power or authority.

In this case there is no reference to the power, there is no reference to the subject of the power, and there is sufficient estate to answer the devise without calling in the aid of the undivided moiety now in question. All the words are satisfied by the undivided moiety of which she was the owner in fee.

It is said that the present is a question of intention, and so perhaps it is. But there are many cases of intention, where the rules by which the intention is to be ascertained are fixed and settled.

It would be extremely dangerous to depart from these rules, in favour of loose speculation respecting intention in the particular case.

It is, therefore, that the wisest Judges have thought proper to adhere to the rules I have mentioned, in opposition to what they evidently thought the probable intention in the particular case before them.

I will refer to one only, to *Jones* v. *Tucker* (*a*) before

(*a*) 2 *Mer.* 533.

Sir

Sir *William Grant*. In that case a person had power to appoint 100*l*. by her will; she bequeathed 100*l*. to the Plaintiff, and, it is said, had nothing but a few articles of furniture of her own to answer the bequest.

The language, which, according to the reporter, Sir *W. Grant* used was this, "In my own private opinion, I think the intention was to give the 100*l*. which the testatrix had a power to dispose of, but I do not conceive that I can judicially declare it to have been executed."

The only circumstance that has been pointed out as furnishing evidence of the testatrix's intending to execute the power in question, is the condition annexed to the devise to *John Roake* the devisee for life, viz. *that he should, out of the rents and profits of the devised premises, keep them in tenantable repair.*

I say this is the only circumstance, because it has been fixed by many cases, that using the words "my estates," although the subject of the power might have been at one period the property of the person to exercise it, will not be considered as an execution of the power.

We are of opinion that the direction respecting the repairs has no effect in proving, according to the authorities, that this testatrix meant to execute her authority over the undivided moiety of this estate.

It appears to us that this would be to contradict that long list of decisions to which I have referred, and would be to indulge an uncertain speculation in opposition to positive rules.

There is no incongruity in directing a tenant for life of an undivided moiety to keep his share of the premises in repair. A person with such an interest is not without remedies for enforcing repairs, and at the worst the devise would make him liable as against the remainderman for dilapidation.

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1830.

DENN dem. NOWELL v. ROAKE.

It seems, therefore, to my Brothers as well as to myself, that the question which your Lordships have been pleased to put to us should be answered in the negative, and that the will of *Sarah Trymmer* did not operate as an execution of her power.

Judgment of the Court of King's Bench affirmed.

MEMORANDA.

Mr. Justice *Burrough* having resigned, Mr. Serjeant *Bosanquet* was appointed a Judge of this Court, and took his seat on the 3d of *February*.

The first of the three general rules, *ante*, p. 347., was sent to the reporter by mistake, and never received the ultimate sanction of the Court.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED 1830.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the Eleventh Year of the Reign of GEORGE IV.

WOOD *v.* ADAM. *April* 29.

THE declaration stated, that the Plaintiff, before the time of the committing the grievances by the Defendant thereinafter mentioned, had been and was a fruit-broker and the business of a fruit-broker exercised and carried on with great credit and integrity, to wit, at *London*; that certain oranges of and belonging to certain persons under the style or firm of Messrs. *John Pirie* and Company, had recently, before the committing of the said grievances by the Defendant as next mentioned,

Defendant told *J. P.* that certain oranges of *J. P.*'s would not have sold so ill if Plaintiff had not, before the sale, propagated a report that *there were* three or four

cargoes of oranges then coming to market; whereupon *J. P.* discontinued employing the Plaintiff as he had before been wont:

Plaintiff thereupon sued Defendant for injuring him, by stating that Plaintiff had caused the loss on *J. P.*'s oranges, by propagating a report that *he* (*Plaintiff*) *had* three or four cargoes of oranges coming to market:

Held, a fatal variance.

1830.

WOOD v. ADAM.

tioned, been sold and disposed of for the account of the said Messrs. *J. Pirie* and Co., at and for certain prices unsatisfactory to the said Messrs. *J. Pirie* and Co., to wit, at, &c., to wit, in a certain sale-room or premises there; and thereupon afterwards, to wit, on, &c. at, &c. in a certain discourse which the Defendant then and there held with *John Pirie* (then and there being one of the persons so trading under the said style or firm), of and concerning the said sales of the said oranges, and of and concerning the cause of the same not having fetched better prices, the Defendant then and there maliciously contriving and intending to prejudice and injure the Plaintiff in the way of his business, and to deprive him of the confidence and good opinion of the said Messrs. *J. Pirie* and Co., and to cause the last-mentioned persons to believe that the said Plaintiff had been the cause of the same not having fetched better prices on the occasion aforesaid, did then and there falsely, deceitfully, and maliciously pretend and represent to the said *John Pirie*, that the Plaintiff had circulated a report in the sale-room, when and where the said oranges were selling, that *he, the Plaintiff, then had* three or four vessels laden with oranges between *Gravesend* and *London*, and that the said report had injured the said sale of the said oranges of them the said Messrs. *J. Pirie* and Co.: whereas the Plaintiff, in truth and in fact, did not circulate or cause to be circulated, a report in the sale-room when and where the said oranges were selling as aforesaid, or otherwise howsoever, that he, the Plaintiff, then had three or four vessels laden with oranges, or any vessel or vessels laden with oranges between *Gravesend* and *London*, and, whereas in truth and in fact, it was not reported at or during the said sale, that the Plaintiff had three or four vessels laden with oranges between *Gravesend* and *London*, or that he had any vessel or vessels

1830.

WOOD v. ADAM.

vessels so laden as aforesaid between *Gravesend* and *London*, as the Defendant during all that time well knew. By means of which said several deceitful and malicious representations and pretences of the Defendant, the said Messrs. *J. Pirie* and Co. then and there believing the same to be true, were then and there induced to suspect and believe, and did in fact suspect and believe that the Plaintiff had maliciously made or authorized the said report as to his, the Plaintiff's, having three or four vessels laden with oranges between *Gravesend* and *London*, and had thereby maliciously prejudiced the said sale of them, the said Messrs. *J. Pirie* and Co.'s said oranges, and been the cause of their not having fetched better prices on the occasion aforesaid, and thereby the said Messrs. *J. Pirie* and Co. were then and there induced to discontinue, and did, in fact, accordingly then and there discontinue, and hitherto had discontinued dealing with the Plaintiff as they theretofore had been used to deal, and but for the premises in that count mentioned, still would have dealt with him in the way of his business of a fruit-broker; and the Plaintiff had thereby lost divers profits and emoluments, to wit, to the amount of 100*l.*, which he otherwise would have acquired from being so dealt with as theretofore by said Messrs. *J. Pirie* and Co.; and the Plaintiff had been, and was by means of the premises in that count mentioned, brought into great scandal and discredit in the way of his said business, and had been and was thereby otherwise greatly injured and damnified, to wit, at, &c.

At the trial before *Tindal* C. J., *London* sittings after *Hilary* term, the language of the Defendant in repeating the assertion which he alleged the Plaintiff to have made, in order to injure the sale of *Pirie*'s fruit, was proved to have been: — "The prices could not have been so unsatisfactory, if the Plaintiff had not before

1830.

WOOD v. ADAM.

the sale propagated a report that *there were* three or four cargoes of oranges coming up from *Gravesend.*"

Whereupon the Plaintiff was nonsuited, the Chief Justice thinking the variance material.

Wilde Serjt. now moved to set aside the nonsuit, on the ground that as this was not an action of slander, but to recover damages for the consequences of a misrepresentation, it was sufficient if the misrepresentation were proved to be one which would have had the same effect as that set out in the declaration, and that the precise language in which it was conveyed was not material. The gist of the action was the injury done to the Plaintiff, by the Defendant's having imputed to him, that with a view to injure the sale of *Pirie* and Co.'s fruit, he had alleged that more fruit ships were coming to market. Such a statement would doubtless have been calculated to prevent a purchase of fruit, but the naming the owner of the ships would not have made any difference in the effect produced, and therefore it was immaterial whether the name of the owner formed part of the statement or not. In like manner, in an action for a tort committed during the performance of a contract, the precise terms of the contract are not material, and a variance in that respect is not fatal. *Ditcham* v. *Chivis* (*a*); and the cases there cited.

TINDAL C. J. It appeared to me that this action was in substance an action for words spoken of the Plaintiff in his trade, in consequence of which *Pirie* and Co. had declined to employ him, as they otherwise would have done, and that it ought to be governed by the rules which apply to actions of that kind. One of those rules is, that the Plaintiff is not to charge the Defendant

(*a*) 4 *Bingh.* 706.

with

1830.

WOOD v. ADAM.

with having employed language of greater malignity than that which he actually used, because the damages must often depend on the form of the expression.

The words complained of by the Plaintiff in this case, as imputed to him by the Defendant, were,—"That *he* had three or four cargoes of oranges on the way from *Gravesend.*" Now, if he had made such a statement, it must have been false within his own knowledge, and much more culpable than a general statement, the accuracy of which he might not have had the means of ascertaining. But the witnesses prove only that the Defendant alleged the Plaintiff to have given out that *there were* three or four ships coming up with fruit, not that the Plaintiff himself had that number of ships coming up.

PARK J. I do not impeach the rule acted on in *Ditcham* v. *Chivis*, and though this is in effect an action of slander, there would perhaps have been no ground for complaint if the words proved had been the same in substance and effect as those laid in the declaration. But the importance of the statement alleged to have been made by the Plaintiff hinged on the assertion that he himself had vessels coming up with fruit.

GASELEE J. I think the nonsuit is right; for it is very different whether the Plaintiff were represented as having spoken of his own knowledge, or merely on general report.

BOSANQUET J. The statement proved varies in a material point from that set out in the declaration, which contains a charge of a very different description. I think, therefore, the nonsuit was right.

Rule refused.

1830.

April 29.

DANCE, provisional Assignee of SHEPHERD, an Insolvent, *v.* WYATT.

The sixteenth section of the 7 *G.* 4. *c.* 57., which declares that it shall be lawful for the provisional assignee of the insolvent debtor's court to sue in his own name for the effects of insolvents, if the court shall so order, is only affirmative of the provisional assignee's right, and he may sue with or without such order.

BY the insolvent debtors' act, 7 *G.* 4. *c.* 57. *s.* 16., it is declared, that it shall be lawful for the provisional assignee *to sue* in his own name, if the court appointed by the act shall so order, for the recovery, obtaining, and enforcing of any estate, debts, effects, or rights of any prisoner, &c.

The Plaintiff being provisional assignee of the Insolvent Debtors' Court, this action of trover was brought in his name, under the following order of the Court, to try the validity of a commission of bankrupt which had been issued against *Shepherd* previously to his petitioning the Insolvent Debtors' Court.

" Pursuant to the act for Relief of Insolvent Debtors in *England* : —

" The Court for Relief of Insolvent Debtors, on the 9th day of *December* 1828 : —

" In the matter of the petition of *Thomas Shepherd*, an insolvent debtor, lately a prisoner in the King's Bench prison : —

" Upon application of the said insolvent debtor, and on reading his affidavit, and also on reading the consent of *Henry Dance*, gentleman, provisional assignee, it is ordered, that the said provisional assignee, upon receiving a satisfactory indemnity, be at liberty *to permit an action to be brought* in his name against *Andrew John Nash* and *Thomas Wyatt*, mentioned in the said affidavit."

The declaration commenced as follows : — " *Thomas Wyatt* the Defendant, and *Andrew John Nash* were attached

1830.

DANCE v. WYATT.

tached to answer *Henry Dance*, the Plaintiff in this suit, and provisional assignee of the court for the relief of insolvent debtors, and of the estate and effects of *Thomas Shepherd*, late of *Claremont Row*, *Pentonville*, in the county of *Middlesex*, heretofore an insolvent debtor, and discharged from imprisonment in pursuance of an act of parliament made in the seventh year of the reign of his present majesty, entitled, 'An act to amend and consolidate the laws for the relief of insolvent debtors in *England*,' by order of the same Court in that behalf duly made, of a plea of trespass on the case."

The insolvent, in his petition, had described himself as of *Claremont Row*, *Pentonville*, merchant and bankrupt.

A verdict having been found for the Plaintiff,

Taddy Serjt. moved to set it aside and enter a nonsuit, on the ground that, under the sixteenth section of the act, the Plaintiff, as provisional assignee, was not entitled to sue unless it appeared by the order of the Insolvent Debtors' Court, that the Court had granted such order in the exercise of its discretion, upon investigating the circumstances of the case: that the present order directed the provisional assignee to permit an action to be brought, while the act directed that the assignee himself should sue: and that it was not competent to the Insolvent Debtors' Court to direct an action to be brought for the purpose of impeaching the jurisdiction of the commissioners of bankrupt, the bankruptcy jurisdiction appearing to be preferred by the legislature whenever the two jurisdictions may be found to clash; as by the sixth section of the 6 *G.* 4. *c.* 16., where the filing a declaration of insolvency is allowed to be treated as an act of bankruptcy. The objection particularly applied in the present case, where the insolvent had in his petition described himself as a bankrupt.

1830.

DANCE v. WYATT.

He also moved on the ground that the verdict was contrary to evidence as to the trading of the insolvent.

The Court adjourned the case to look into the decisions, and now

TINDAL C. J. said,—Upon looking into the cases, we think this rule ought not to be granted.

Three objections have been taken to the verdict. First, that the Plaintiff had no authority to sue without a direct order from the Insolvent Debtors' Court, obtained upon a consideration of the circumstances of the case. But, upon looking at the statute, we think the assignment itself would *primâ facie* give the Plaintiff a right to sue; and the language of the sixteenth section seems to be only affirmative, and not to interfere with the assignee's *primâ facie* right. And this point has in effect been decided in *Doe d. Clark* v. *Spencer* (*a*), where this Court held, that the order of the Insolvent Debtors' Court need not be given in evidence at the trial. And although that was a decision on a former statute, yet the language in both statutes is the same.

The second objection is, that the Insolvent Debtors' Court is not competent to institute proceedings for the purpose of impeaching the jurisdiction of the commissioners of bankrupt.

But this objection assumes that the insolvent has been a bankrupt, which is the very point in dispute.

The evidence as to the trading was fully left to the jury, and we have no reason to be dissatisfied with the conclusion to which they have come.

Rule refused.

(*a*) 3 *Bingh.* 203.

1830.

LLOYD *v.* WIGNEY and Others. *May* 3.

THE fourth count of the declaration stated, That before and at the time of the committing the grievances thereinafter next mentioned, the Plaintiff was lawfully possessed of a certain messuage, dwelling-house, and stabling, with the appurtenances thereto belonging, called the *New Ship Inn*, situate and being in *Ship Street* in the parish of *Brighthelmstone*, in the county of *Sussex*; which said messuage, dwelling-house, and appurtenances, he the said Plaintiff used and occupied as an inn for the reception, lodging, and entertainment of travellers and others putting up and abiding therein, and the business of an innkeeper used, exercised, and carried on therein, to wit, at, &c. Yet the said Defendants, well knowing the premises, but contriving and intending to injure and aggrieve the said Plaintiff in the use, occupation, and enjoyment of the said messuage, dwelling-house, and stabling, with the appurtenances, theretofore, to wit, on the 19th of *February* 1828, and on divers other days and times between that day and the day of the commencement of that suit, at, &c., wrongfully and unjustly, without leave or licence of, and against the will of the said Plaintiff, did, by divers wrongful and improper acts, and otherwise, wrongfully and injuriously cause and procure the foundation and walls, and other parts of the said messuage, dwelling-house, and premises, to sink, bilge, and become cracked, injured, and broken, and in danger of falling, and the said messuage and dwelling-house, and premises, then and there became and were rendered unfit for habitation for a long space of time, to wit, from the day and year aforesaid, hitherto;

By the *Brighton* improvement act, actions for any injury done by the commissioners under the act, are to be brought within six months after *the thing done.*

The Defendants, proceeding under that act to dig a sewer, cracked the walls of the Plaintiff's house: Held, that the Plaintiff's right of action was limited to six months after the day on which the crack was occasioned, and did not continue for as long a time as the crack continued.

1830.

LLOYD v. WIGNEY.

hitherto; and by means of the premises the said Plaintiff had been forced and obliged to pay, lay out, and expend, and had paid, laid out, and expended, divers large sums of money, amounting in the whole to the sum of 500*l.* of like lawful money, in repairing, supporting, and amending the foundation, walls, and other parts of the said messuage, dwelling-house, and premises; and also during all the time aforesaid, the said Plaintiff, his family and guests residing in the said messuage, were greatly disturbed and incommoded; and also by means of the premises, divers persons, who, at the time of the committing the grievance last aforesaid, were boarding, lodging, and residing in the said messuage and dwelling-house and premises, of the said Plaintiff, to the great gains and profits of the said Plaintiff, left and quitted the same; and also by means of the premises, the said Plaintiff had been greatly injured in his business of an innkeeper, having lost the custom and employment of divers, to wit, of 100 travellers and guests who would otherwise have employed said Plaintiff in his said trade and business, and put up, resided, and lodged, at the said premises of the said Plaintiff, to the great gains, profits, and advantage of the said Plaintiff, to wit, at, &c.

At the trial before *Gaselee* J., *Sussex* Summer assizes 1829, it appeared that the Defendant *Wigney*, as treasurer, and the other Defendants as surveyor and contractors, under an act for the improvement of the town of *Brighton*, had, for the purpose of making a sewer, dug a trench twenty-seven feet deep in the street where the Plaintiff's house stood. The soil being of a friable nature, and the Defendants not having supported the sides of the trench with struts across, the foundation of the house sank, and the walls cracked, although they had been shored up by the Defendants. All this had taken place previously to the 6th of *April* 1828. The Plaintiff com-

commenced his action on the 6th of *October* in that year, after giving the Defendants the following notice: — "To *William Wigney*, *Amon Wilds*, *William Lambert*, senior, and *William Lambert*, junior. — I do hereby give you notice that, at or shortly after the expiration of fourteen days from the time of your being served with this notice, I shall commence an action in the Court of Common Pleas against you, to recover damages for the injury I have sustained by reason of your wrongful acts, to wit, that you did sometime in the months of *February*, *March*, and *April*, now last past, by yourselves, your servants or workmen, make, alter, cut, dig, work, and enlarge, divers sewers, gutters, drains, and ditches, in and under a certain street in the town of *Brighthelmstone*, in the county of *Sussex*, commonly known by the name of *Ship Street*, near to and under a certain messuage or dwelling-house, stabling and premises, in my tenure and occupation as an inn, commonly known by the name of the *New Ship Inn*, situate and being in *Ship Street* aforesaid, in so negligent, incautious, improvident, and improper a manner, that certain of the walls of the said messuage and premises sank and cracked, and the said messuage and premises generally became and were greatly endangered, and otherwise injured, and by reason thereof, certain persons then using the said messuage and premises as such inn as aforesaid immediately quitted the same, and divers other persons have since omitted to use the said messuage and premises as such inn as aforesaid, who would have frequented and used the same but for the damage occasioned in manner above mentioned; and also that you did, by yourselves, your servants or workmen, after the sinking and cracking of the walls as aforesaid, so insufficiently, imprudently, and unskilfully shore up and support the said messuage and premises, that I have been for many months deprived of so full and beneficial an enjoyment and occupation thereof as I ought to and otherwise

1830.

LLOYD v. WIGNEY.

wise should have had, and by reason of the above premises I have suffered great loss and damage.

"Dated this 19th of *September* 1828.

(Signed) "DAVID LLOYD."

The Defendants had, in the outset, given the Plaintiff notice of their intention to construct a sewer.

The Plaintiff proved, that subsequently to the 6th of *April*, he was inconvenienced by the shores preventing free access to his house. The crack in his wall was not repaired until after that day.

The 255th section of the *Brighton* act, 6 *G.* 4. *c.* 179., having enacted that actions against persons proceeding under the act shall be brought within six calendar months after *the matter or thing done*, and that notice shall be given to the commissioners appointed under the act of the ground of action, it was objected on the part of the Defendants, that the action had been commenced too late; that there had been no proof of any of the injuries specified in the notice to the treasurer having been experienced within six months; that there was no count in the declaration applicable to the injury alleged to have been occasioned by the prevention of access; that the notice ought to have been addressed to the commissioners, or to the treasurer in his character of treasurer; and that the action did not lie for the Plaintiff, who ought, upon receiving notice of the commissioners' intentions, to have taken precautions for the safety of his own house.

The learned Judge left it to the jury to say, Whether there had been negligence in the commissioners; whether they had given notice of their intentions as to the sewer; and whether the access to the Plaintiff's house had been obstructed subsequently to the 6th of *April*.

The jury found for the Plaintiff 100*l.* damages, and that the access had been obstructed subsequently to the 6th of *April*.

Wilde

1830.

LLOYD v. WIGNEY.

Wilde Serjt., pursuant to leave reserved, obtained, upon the objections advanced at the trial, a rule *nisi* to set aside the verdict, and enter a nonsuit.

Taddy Serjt. shewed cause on all the points; but the judgment of the Court is confined to the question of time.

The action was brought in time; for the *thing done*, in the language of the statute, is the injury to the Plaintiff as long as it continues; and the Plaintiff has six months from the time the injury has ceased. The Plaintiff's wall was cracked, and his foundation disturbed, and as long as the cracks continued, he was entitled to bring his action. But at all events the obstruction to access was within the six months, and that is an injury comprehended in the language of the fourth count of the declaration, and in the notice given to the treasurer. The fourth count of the declaration, on which the Plaintiff relies, alleges that the Defendants "did by divers wrongful and improper acts, and otherwise, wrongfully and injuriously cause and procure the foundation and walls, and other parts of the said messuage, dwelling-house, and premises, to sink, bilge, and become cracked, injured, and broken, and in danger of falling; and the said messuage and dwelling-house, and premises, then and there became and were rendered unfit for habitation for a long space of time, to wit, from the day and year aforesaid hitherto; that during all the times aforesaid, the said Plaintiff, his family, and guests residing in the said messuage, were greatly disturbed and incommoded; and that by means of the premises the said Plaintiff had been greatly injured in his business of an innkeeper, having lost the custom and employment of divers, to wit, of 100 travellers and guests, who would otherwise have employed said Plaintiff in his said trade and business, and put up, resided, and lodged at the said premises of the said Plaintiff."

The

1830.

LLOYD v. WIGNEY.

The Defendants, by placing the shores against the Plaintiff's house, admit that they have occasioned the subsidence of the walls, and that they are responsible for the consequences; and all the ensuing mischief is comprehended in the injury to the wall, which is the original cause of the obstruction. It is not necessary that the notice should be drawn up with minute precision. In *Jones* v. *Bird* (*a*), the notice ascribed the injury to the digging of a drain, whereas the immediate cause of injury was the falling of chimneys occasioned by the digging of the drain.

Wilde, (*Andrews* Serjt. was with him) in support of the rule. Continuing damage can only be, where each day brings a repetition or accession of injury, as where water is forced back or diverted, or an imprisonment prolonged: In which case a Defendant may be liable for the portion of imprisonment endured within the time limited for action: *Massey* v. *Johnston*. (*b*) But if a wall be cracked, and remain in the same state for months, the damage is always the same, and the time for suing must be calculated from the day when the crack was occasioned, otherwise a party, by suffering things to remain in the same state, might postpone his action till all the Defendant's evidence had perished.

In *Goding* v. *Ferrers* (*c*) it was held, that an action cannot be maintained against officers of the customs, for seizing goods as forfeited by the revenue laws, unless it be brought within three months after the actual seizure; notwithstanding a suit be instituted in the Court of Exchequer for the condemnation of the goods, which is depending at the expiration of the three months. In *Saunders* v. *Saunders* (*d*), where the commander of

(*a*) 5 *B.* & *A.* 843.
(*b*) 12 *East*, 67.
(*c*) 2 *H. B.* 14.
(*d*) 2 *East*, 254.

one

1830.

LLOYD v. WIGNEY.

one of the king's armed vessels seized a vessel and cargo at sea, and put them into the next port on suspicion of smuggling, and after process in the Exchequer the owner obtained an order for re-delivery, under which he obtained only a part of the goods from the Defendants, it was held, that the owner could not maintain trover for the remainder, if the action were brought after three months from the original seizure, though within three months from the order for the re-delivery. So, in *Crook* v. *M'Tavish* (*a*), where an officer in the preventive service boarded a ship on the 23d of *August*, and left three armed men on board, but did not then determine on detaining her as a seizure; on the 25th he decided on seizing her, and detained her till the 24th of *September*; the owner having sued him for this seizure and detention, it was held, that the time within which the action should have been commenced under 28 *G.* 3. *c.* 37. (three months after the matter or thing *done*,) must be computed from the 23d of *August*. In *Gillon* v. *Boddington* (*b*) and *Roberts* v. *Read* (*c*), though the act done by the defendants which occasioned the injury to the plaintiffs was beyond the time limited for action, the injury itself, namely, the falling of the walls, took place within the limited time; but in the present case, the injury to the Plaintiff, viz. the cracking of his wall, was, as well as the act of the Defendants, beyond the limited time.

The Plaintiff, therefore, is too late; for the obstruction of access, occasioned by the continuance of the shores, is not one of the injuries complained of in the declaration or notice. Injury to a wall is an injury of so different a nature from injury occasioned by obstruction of access, that it could never have occurred to the Defendants that the one was intended to comprehend the other.

(*a*) 1 *Bingh.* 167. (*b*) 1 *R. & M.* 161. (*c*) 16 *East*, 215.

TINDAL

1830.

LLOYD v. WIGNEY.

TINDAL C. J. It is unnecessary for us to decide many of the points which have been argued in this cause; for the first question is, Whether any damage has been proved to have been sustained by the Plaintiff within the time limited for the commencement of his action by the 255th section of the statute, and within the terms of his notice and declaration: for unless he brings himself within all those three predicaments his action does not lie. Now, the jury have negatived any damage within the six months allowed for the commencement of the action, except the keeping up the shores and the consequent obstruction of access to the Plaintiff's house. Is this a damage specified in the Plaintiff's notice or his declaration? The notice is, that the Defendants made a sewer near the Plaintiff's premises in so negligent a manner that the walls of the premises sank and cracked, the premises were injured, many persons quitting them, and many persons abstaining to use them who would otherwise have used them, and also that the Defendants so unskilfully and imprudently shored up the walls of the premises as to deprive the Plaintiff of the full and beneficial enjoyment he would otherwise have had. The count of the declaration which is relied on, states, that the Defendants "did, by divers wrongful and improper acts, and otherwise wrongfully and injuriously, cause and procure the foundation and walls, and other parts of the said messuage, dwelling-house, and premises, to sink, bilge, and become cracked, injured, and broken, and in danger of falling; and the said messuage and dwelling-house and premises, then and there became and were rendered unfit for habitation for a long space of time, to wit, from the day and year aforesaid hitherto; that during all the times aforesaid, the said Plaintiff, his family, and guests residing in the said messuage, were greatly disturbed and incommoded; and that, by means of the premises, the

the said Plaintiff had been greatly injured in his business of an innkeeper, having lost the custom and employment of divers, to wit, of 100 travellers and guests, who would otherwise have employed said Plaintiff in his said trade and business, and put up, resided, and lodged at the said premises of the said Plaintiff."

This does not correspond with the only damage proved within six months, namely, the keeping up the shores; and there being no mention of that in the notice or declaration, the rule must be made absolute.

PARK J. I am of the same opinion. The digging of the sewer took place more than six months before the action commenced, and so did the damage occasioned by it. Then, has the shoring up of the house occasioned injury to the Plaintiff? It may have done so, but it is not stated either in the notice or declaration; and, therefore, the action, as conceived, is too late.

GASELEE J. This verdict could only now be supported on the supposition that the injury proved within the six months, was part of the injury occasioned by the construction of the sewer, and described in the declaration and notice; and the question is, whether the shoring up the walls, and consequent obstruction of access, might not be considered as a continuing damage within the terms of the declaration? I have some little doubt on the subject, but not enough to induce me to divide the Court; and I agree that the complaint as to the omission to remove the shores, is not comprehended in the notice or declaration.

BOSANQUET J. I am of opinion that this rule ought to be made absolute. Two injuries have been complained of: the construction of a sewer, by which the

1830.

LLOYD v. WIGNEY.

Plaintiff's walls were cracked; and the omission to remove certain shores from his house, by which access to it was obstructed. The first occurred more than six months before the action was commenced; for I cannot consider the continuance of the cracks in the wall as a continuing damage, since the damage was the same at the end of six months as at first. There was no repetition of injury in the interval. As to the second, it was not within the terms of the Plaintiff's notice or declaration.

Rule absolute.

May 3.

CHAMBERS *v.* BERNASCONI and Another.

Where an uncertificated bankrupt, in order to try the validity of his commission, held his assignee to bail in an action for money had and received, the Court discharged the assignee upon filing common bail.

THE Plaintiff, an uncertificated bankrupt, with a view to try the validity of the commission, arrested the Defendants, his assignees under the commission, for 40,000*l.* as money had and received to his use; whereupon *Tindal* C. J., during vacation, issued an order for liberating the Defendants on filing common bail.

Russell Serjt., on the part of the Plaintiff, now moved to rescind this order, or for the Defendants to pay 40,000*l.* into court. He submitted, that although it was usual to try the validity of a commission of bankrupt by an action of trover, yet it might equally be disputed in an action for money had and received; *Donovan* v. *Duff* (*a*)—in which case, though the decision was against the bankrupt on another ground, no exception was taken to the form of action;—and if so, the giving of special or common bail depended on the amount for which the Defendant was arrested, and not on the discretion

(*a*) 9 *East*, 21.

cretion of the Court. (*a*) No distinction could be drawn between this and any other action the merits of which the Court would not try on affidavit. In *Ex parte Cutten* (*b*), a bankrupt who had abandoned a petition presented by him in *June* 1821 for a supersedeas, and had joined in a conveyance of part of his property, and solicited and procured the requisite signatures to his certificate, was restrained from proceeding in an action brought by him against the messenger to impeach the commission; but the plaintiff here had never abandoned his right to dispute the commission, or obtained his certificate.

The Court took time to consider, and its decision was now pronounced by

TINDAL C. J. This was an application to the Court for a rule to shew cause, why an order made by the Chief Justice, in vacation, in this cause, should not be set aside; or why the sum of 40,000*l.*, for which the Defendants had been arrested, should not be paid into Court.

It appeared, upon the making of the original order, that the Plaintiff was an uncertificated bankrupt, and that he had issued bailable process against the Defendants, who were his assignees, upon an affidavit that the Defendants were indebted to him in 40,000*l.* and upwards, for money had and received to his use; it being the professed object of the Plaintiff to try, by this mode of proceeding, the validity of the commission issued against him. Upon this process two of the Defendants had been arrested, and had given bail to the sheriff; and upon application by them to the Chief Justice, that the bail bonds should be delivered up to be cancelled on the Defendant's entering a common appearance, an order to that effect was made.

(*a*) *Tidd*, 249. (*b*) 1 *Glyn & J.* 317.

1830.

CHAMBERS v. BERNASCONI.

It has been objected, that there is no ground for such an order; for that the bankrupt has a right to try the validity of the commission by this form of action; and, if so, has the right, like any other subject, to the security of his debtor's person; and that it is contrary to the practice of the Court to try the merits of the action on affidavits.

But we think the courts have always exercised, and have the power to exercise a general controul over the right of the Plaintiff to hold to bail. Before the statute of 12 *G.* 1. *c.* 29., the power of arresting depended on the practice of the Court only, modified from time to time by rules of the Court for that purpose. Thus, the practice of not allowing a second arrest for the same cause of action; of not allowing an arrest when the original debt was less than 10*l.*, but raised up to that sum by the costs of a former action; of allowing the Plaintiff to hold to bail in actions of trover and trespass, have no other foundation than the rules of the Court. And the statute above referred to took away no authority which the Court antecedently possessed, except that it prevented the issuing of bailable process for a smaller sum than 10*l.* The Courts, therefore, may still interpose, and accordingly, in various cases, have interposed in a summary way, and have discharged the Defendant on common bail. Thus, in *Fry* v. *Malcolm* (*a*), where the Plaintiff had commenced an action on the prothonotary's *allocatur* for costs, and had arrested the Defendant, this Court, though they would not stay the proceedings, held the arrest to be bad. In *Taylor* v. *Higgins* (*b*), the Court of King's Bench discharged a Defendant out of custody, on the ground, that the giving a new security by the Plaintiff to a creditor of the Defendant, could not be considered as money paid

(*a*) 4 *Taunt.* 705. (*b*) 3 *East*, 169.

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1830.

CHAMBERS v. BERNASCONI.

to the Defendant's use, upon which ground alone he had been held to bail. In *Nizetich* v. *Bonacich* (*a*) the Court of King's Bench discharged the Defendant, where it appeared from the Plaintiff's own letters that the Defendant was his creditor in a considerable sum; and in *M'Ginnis* v. *M'Curling* (*b*), the principle that such excepted cases may exist, in which the Court may interpose by their summary jurisdiction and discharge the Defendant, was fully admitted by the Court.

And we think the principal case is of that description. An uncertificated bankrupt can have no property, no rights of action even against third persons, unless with the assent of his assignees. How can he have any as against the assignees themselves? It should be remembered also, that before he was declared a bankrupt, the facts necessary to establish the bankruptcy must have been deposed on oath by third persons, and the bankruptcy declared by the adjudication of commissioners sitting under the authority of an act of parliament; and it seems unreasonable, that upon the single and unconfirmed affidavit of the bankrupt himself, all that has been so done should be taken to be without foundation; and looking at the consequences of allowing such a proceeding, we think they would be most injurious to the public; for what respectable person would become assignee to a bankrupt's estate, if, at any moment of time, he was liable to be arrested for the full amount of the assets realized, merely because the bankrupt believed, to which belief his wishes would often lead him, that the commission was invalid? Without breaking in, therefore, upon the general rule, that the Court will not try the merits of a case on counter affidavits, we think this case forms an exception of so strong a nature

(*a*) 5 *B. & A.* 904. (*b*) 6 *Dowl. & Ryl.* 24.

1830.

CHAMBERS v. BERNASCONI.

that all must reclaim against applying to it the general rule; and, upon this ground, we refuse the rule to shew cause.

Rule refused.

May 4.

CUMING and Another, Assignees of HEALE, a Bankrupt, *v.* WELSFORD and Others.

An execution on a final judgment following a judgment by *nil dicit*, held to be within the proviso of *s.* 108. 6 *G.* 4. *c.* 16., although there was no concert between the parties, and the judgment was obtained before the act came into operation.

BY 6 *G.* 4. *c.* 16. *s.* 108. it is enacted, "That no creditor, having security for his debt, or having made any attachment in *London* or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied, by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy; provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors."

Heale, the bankrupt, having been sued by the Defendants in *assumpsit* for the recovery of the amount of a bill of exchange drawn by him, suffered judgment by *nil dicit* in *January* 1825. A writ of error having been brought, judgment was affirmed in *Hilary* term 1826, and on the 6th of *February* in that year, a sheriff's officer took possession of *Heale*'s goods under a *fi. fa.* issued upon this judgment. At the request of *Heale*, the sale of the goods was postponed till the 4th of *April* following; but on the 3d of *April* he committed

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1830.

CUMING v. WELSFORD.

an act of bankruptcy, and a commission of bankrupt having afterwards issued against him, his assignees brought the present action to recover from the Defendants the proceeds of the sale under their execution.

A verdict having been found for the Plaintiffs at the trial of the cause before *Gaselee* J., last *Exeter* assizes, with leave for the Defendants to move to set it aside and enter a nonsuit,

Stephen Serjt. moved for a rule *nisi* to that effect, on the ground that this case did not fall within the proviso of the 108th section above set out. The judgment on which the Defendants had issued execution was not within the letter or the policy of that proviso. Not within the letter; because it was not an execution on a judgment by default, — as it might have been if the action, instead of *assumpsit*, had been debt, in which a judgment by default is final, — but an execution on a final judgment *after* a judgment by default. Not within the policy; because the judgment had not been concerted by the parties to defeat the creditors at large, but was suffered by *Heale in invitum*, because he had no defence to a *bonâ fide* demand.

Secondly, the judgment was obtained before *September* 1825, when the act came into operation, and was, therefore, an existing right, which the legislature would not annul without express enactment. There was nothing retrospective in the language of the proviso, which seemed to point almost expressly to judgments to be obtained subsequently to the passing of the act.

Merewether Serjt. moved for a similar rule in another cause, similarly circumstanced.

The Court took time to consider, and now judgment was delivered by

1830.

CUMING v. WELSFORD.

TINDAL C. J. In this case the Defendant applies for a rule to shew cause why the verdict for the Plaintiffs should not be set aside, and a new trial be had, on the ground that the judgment and execution on which he relies do not fall within the proviso of the 108th section of the bankrupt act: and, consequently, that the execution is protected by the general enactment of the section itself, as having been "served and levied by seizure before the bankruptcy."

It was contended on two distinct grounds, that the case is not governed by the words of the proviso; first, that this is not properly an execution on a judgment by default, but on a final judgment after a judgment by default; and even if it is to be considered as an execution on a judgment by default, the proviso includes only such judgments by default as are suffered by agreement of the parties: secondly, that the proviso relates only to judgments obtained after the act.

But notwithstanding these objections, we think the case falls within the proviso. As to the first, it is to be observed, that the words themselves comprise every species of judgment obtained against a defendant, except judgment after verdict, trial by the record, and on demurrer. The judgment, therefore, on which this execution issued, not being one of any of the latter classes, it is difficult to maintain that it does not fall within those named in the proviso. Nor does it seem less a judgment by default, because a writ of inquiry is interposed between the interlocutory and the final judgment, such writ being no more than an inquest of office to inform the conscience of the Court, who might proceed immediately to ascertain the damages, if they so thought fit. The judgment, therefore, ranging itself under the description of a judgment by default, we do not see by what principle we can restrain the very general words used in the proviso, to judgments of default

default by the consent or collusion of the Plaintiff and Defendant. It may be admitted that the primary object of the legislature was to provide against the inconvenience felt by the creditors of bankrupts from judgments suddenly entered up, and execution levied on secret warrants of attorney; and that the clause in question, which is copied from the *Irish* bankrupt act 11 & 12 *G.* 3. *c.* 8. *s.* 4., was introduced principally with that object. But the legislature, when it wished to frame enactments as to warrants of attorney, knew how to describe them by their name, as in the 3 *G.* 4. *c.* 39.; and again, by using the very general words, "*any* judgment obtained by default, &c.," instead of referring to judgments on warrants of attorney, it appears to us the better inference that more was intended to be included; and that *all judgments* by default must be intended to be comprised, particularly as in all cases consent and collusion may so easily exist, but be with so much difficulty brought to light.

As to the second objection, the words "obtained by default, &c." describe as well a judgment then obtained, as one to be obtained after passing the act; and as the act in the very same clause, uses words of a future signification,—"provided that no creditor who *shall* sue out execution upon any judgment obtained, &c."— we think, if the clause had been meant to apply to future judgments only, the legislature would have said, "to be obtained," or have used a similar expression. And, upon such a construction, it is to be observed, that all executions issued upon judgments entered up before the 1st of *September* 1825, on secret warrants of attorney then in existence, would be protected, for which there seems no reason whatever.

On the whole, therefore, we think this execution falls within the enactment of the proviso, and that the rule prayed for by the Defendants should not be granted.

Rule refused.

1830.

May 4.

ADAMS *v.* DANSEY.

1. The Plaintiff, an occupier of land, at the request of the Defendant, and upon a promise of indemnity, resisted a suit of the vicar for tithes: Held, that this was not a promise required by the statute of frauds to be in writing.

2. The vicar having succeeded in the suit, Plaintiff's attorney paid the vicar the costs recovered from the Plaintiff. The Plaintiff gave his attorney a promissory note for the amount, and before the promissory note became due, sued the Defendant:

Held, to be sufficient proof of an allegation that the Plaintiff had paid the vicar's costs.

THE second count of the declaration stated, That whereas before the time of the making of the promise and undertaking by the Defendant as thereinafter mentioned, disputes had arisen and were depending between the Defendant and divers other persons claiming to be proprietors of land in the parish of *Little Hereford*, on the one part, and *Charles Price*, as the vicar of the same parish, of the other part, touching and concerning certain tithes claimed by the said *Charles Price* as such vicar as aforesaid, to wit, at, &c.; and whereas the said *Charles Price*, as such vicar as aforesaid, before the time of the making of the promise and undertaking by the Defendant thereinafter mentioned, had exhibited his certain *English* bill of complaint in his majesty's Court of Exchequer against the Plaintiff and one *John Cadwallader*, then and there respectively being occupiers of divers lands in the said parish, for receiving the said tithes so claimed by him as aforesaid, whereof the Defendant then and there had notice; and thereupon afterwards, to wit, on, &c. at, &c. in consideration that the Plaintiff, at the special instance and request of the Defendant, would suffer the Defendant to defend the said suit in the said Court of Exchequer in the name of the Plaintiff, (jointly with the name of the said *John Cadwallader*,) the Defendant undertook and then and there faithfully promised the Plaintiff to save harmless, and indemnify him from all payments, damages, costs, and expenses, which he should or might incur, bear, pay, sustain, or be liable for, by reason of the said suit in the said Court of Exchequer being

1830.

ADAMS v. DANSEY.

being so defended; and that he, confiding in the said promise and undertaking of the Defendant, did afterwards, to wit, on, &c. at, &c. suffer the Defendant to defend the said suit in the said Court of Exchequer in the name of the Plaintiff, (jointly with the name of the said *John Cadwallader*,) and the same suit was then and there so defended as aforesaid, and had since ended and determined, to wit, at, &c.; and the Plaintiff averred, that he, under and by virtue of a certain decree made in the said suit, was forced and obliged to pay and did then and there pay unto the said *Charles Price* a certain large sum of money, to wit, 84*l.*, for certain costs in the said last-mentioned suit; and was also then and there forced and obliged to pay and did pay a certain other sum of money, to wit, 9*l.* 17*s.* 2*d.*, being the costs of and incident to a certain attachment then and there issued against the Plaintiff out of the said Court of Exchequer, to compel payment of the costs of the said last-mentioned suit; whereof the Defendant afterwards, to wit, on, &c. at, &c. had notice; yet the Defendant, disregarding his said promise and undertaking so by him made as aforesaid, and contriving and fraudulently intending craftily and subtilly to deceive and defraud the Plaintiff in that respect, did not nor would, although often requested so to do, save harmless or indemnify the Plaintiff from the said costs, charges, and expenses, so by him the Plaintiff paid as aforesaid, but had wholly refused and neglected so to do, to wit, at, &c.

At the trial before *Vaughan* B., last *Worcester* assizes, it appeared that the Plaintiff *Adams*, as occupier of certain lands in the parish of *Little Hereford*, had been sued for tithes by *Price* the vicar. The landowners of the parish, relying on a modus, resolved that the vicar's suit should be resisted, and for that purpose agreed to contribute to the expenses in the same proportions

1830.

ADAMS v. DANSEY.

portions as they were rated to the poor's rates: they then requested the Plaintiff and the other occupiers to persist in defending the suit. The Plaintiff refused, as he had quitted the parish since the commencement of the suit; whereupon the Defendant orally agreed to indemnify him.

The Plaintiff then consented to defend the suit. The vicar having recovered, the Plaintiff's attorney paid the vicar the costs he was entitled to claim from the Plaintiff, as well those incurred before as those incurred subsequently to the Defendant's promise of indemnity. The Plaintiff gave his attorney a promissory note for the amount so paid to the vicar; but this promissory note was not discharged till after the commencement of the present action.

A verdict having been found for the Plaintiff on the second count of the declaration,

Russell Serjt., pursuant to leave reserved at the trial, obtained a rule *nisi* to set aside the verdict and enter a nonsuit, or to reduce the damages to 25*l.*, the sum paid for costs incurred subsequently to the Defendant's promise, on the ground that, as an undertaking to be answerable for the debt of a third person, it was void under the statute of frauds for want of a writing; that there had been no payment of the debt, as alleged in the second count, the Plaintiff not having discharged the promissory note he gave to his attorney till after the commencement of the present action; and that, at all events, there was no consideration for the promise to indemnify, as far as concerned the costs incurred before the promise.

Wilde Serjt., who shewed cause, contended that the costs for which the Plaintiff became liable to the vicar were the Plaintiff's own debt, or liability, for the payment

ment of which, whether as an actual or contingent charge, he had a right to stipulate before he permitted his name to be used for the purposes of the land-owners.

Then, the allegation of payment had been sufficiently proved by shewing that the vicar had been paid. Payment by the Plaintiff's attorney was the same thing as payment by the Plaintiff; and the mode in which the Plaintiff settled with his own attorney, whether by a promissory note or otherwise, was immaterial.

Russell in support of his rule. At the time the Defendant entered into the agreement the vicar's suit had not been determined, and it could not be known whether the Plaintiff would have to pay costs to the vicar, or the vicar to the Plaintiff; and if the cause had been decided against the vicar, the Defendant, according to his agreement, must have been responsible for the vicar's default, in case the vicar had failed to pay the Plaintiff's costs. The agreement, therefore, as to that contingency at least, ought to have been in writing under the statute, and if so, it ought to have been in writing for the whole, for the agreement is entire, and cannot be severed. *Lexington* v. *Clarke* (*a*), *Chater* v. *Beckett*. (*b*) Had the agreement been confined to the Plaintiff's own costs it might have been otherwise. But in *Winkworth* v. *Mills* (*c*) it was held that a promise by the indorser of an unpaid note to indemnify the holder if he would proceed to enforce payment against the other parties to the note, was void under the statute of frauds unless evidenced by writing. That was a promise to pay a plaintiff's expenses; the present is to pay a Defendant's; and there can be no difference in

(*a*) 2 *Ventr.* 223. (*b*) 7 *T. R.* 201. (*c*) 2 *Esp.* 484.

principle

1830.
ADAMS
v.
DANSEY.

principle between the two. *Howes* v. *Martin* (*a*) is distinguishable, on the ground that the plaintiff had accepted bills for the accommodation of the defendant, and was therefore entitled to all expenses occasioned by such bills.

But the averment of payment by the Plaintiff has not been proved. The promissory note given by him to his attorney was merely a security, not a payment. Such a security cannot be treated as money, *Maxwell* v. *Jameson* (*b*), *Taylor* v. *Higgins* (*c*), except by the consent of the parties, as in *Pickard* v. *Bankes*. (*d*)

TINDAL C. J. This rule has been obtained on two grounds: first, that the Defendant's promise was an undertaking within the statute of frauds, and that, the promise not having been reduced to writing, the Plaintiff could not recover; secondly, that the allegation of payment by the Plaintiff has not been made out in proof, the evidence shewing no payment by the Plaintiff till after the commencement of the action.

We think that neither objection can be sustained. This was not a promise within the statute of frauds. The words of the statute are, "No action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement on which such action shall be brought, or some note or memorandum thereof, shall be in writing," &c. Here, as between *Adams* and *Dansey*, what promise is there as to the debt, default, or miscarriage of another? It is a direct promise to repay *Adams* any money which might be paid by him for costs in the suit between the vicar and *Adams*. It has been urged that, at all events, the pro-

(*a*) 1 *Esp.* 162.
(*b*) 2 *B.* & *A.* 51.
(*c*) 3 *East*, 169.
(*d*) 13 *East*, 20.

mise

mise would not be available for costs antecedently incurred. But it was competent to the Plaintiff to make any bargain he pleased as the price of his resisting the tithe suit for the benefit of the Defendant.

Then, has there been any payment of costs within the terms of the second count? The Plaintiff's attorney made the payment to the vicar, the successful party in the tithe suit; and though it is true the Plaintiff had not repaid his own attorney at the time of this action, yet, inasmuch as the party entitled had been satisfied, and could make no further claim, the payment had clearly been made. The Plaintiff's attorney was his agent for the purpose of making that payment, and it is immaterial in what way he afterwards settles the account with his principal.

GASELEE J. (*a*) The averment of the payment of costs to the vicar is fully proved by the payment of the Plaintiff's attorney in 1823; it was a payment by an agent, and it is not necessary to consider the effect of the promissory note given by the principal in settling the account with his agent.

As to the other point, the answer has been given by my Lord Chief Justice. This is not an undertaking for the debt, default, or miscarriage of another, it is for a liability to which the Plaintiff himself was to be exposed at the request of the Defendant. But there is a sufficient consideration even for the by-gone costs, for the vicar's claim had been resisted at the instance of the Defendant, and the Plaintiff was at that time liable in case the vicar should succeed.

BOSANQUET J. I agree on both points. The Plaintiff, on allowing his name to be used for the purposes of

(*a*) *Park* J. was at Chambers.

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1830.

ADAMS v. DANSEY.

the Defendant, was at liberty to impose such terms as he pleased, either as to the past or the future costs, and the debt for the discharge of which he stipulated was his own debt, not that of a third person.

The other question is, not whether the promissory note was treated as money between the Plaintiff and his agent, but whether the party who succeeded in the tithe cause had been paid his costs.

He was paid by the Plaintiff's agent, and payment by the agent is payment by the principal. After payment by his agent, the Plaintiff, as liable to his agent, was damnified, and entitled to sue the Defendant.

The rule must be

Discharged.

May 5.

WILLANS *v.* TAYLOR.

The Defendant sent the Plaintiff a copy of a bill of exceptions, in order to his concurring in the statement of facts, and, at the same time, sued out a writ of error: Held, that the Plaintiff had no right to retain the bill of exceptions, in order to frustrate it, on the ground that the Defendant had waived it by suing out a writ of error.

UPON the trial of this cause, at the *Middlesex* sittings on the 23d of *December* last, a bill of exceptions was tendered on the part of the Defendant, and reduced to writing before the cause was over. The bill of exceptions in an extended form was, at the suggestion of the Chief Justice, sent to the Plaintiff's attorney on the 11th of *February* following, in order that he might agree to it or suggest alterations before it was signed by the Chief Justice, who had presided at the trial. On the same day the Defendant, who had also brought a writ of error, gave a rule to transcribe.

The Plaintiff having taken no notice of the copy of

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the bill of exceptions, a Judge's order was obtained, calling on him to return it to the Defendant.

Cross Serjt. obtained a rule *nisi* to discharge this order, on the ground that the Defendant, by bringing a writ of error, had waived his bill of exceptions; for which he cited *Dillon* v. *Parker*. (*a*)

Taddy Serjt. shewed cause. *Dillon* v. *Parker* was an application to a court of error, and the court decided on the ground that they had no authority to interfere, for the application should have been to the court below. *Wood* B. was the only Judge who expressed an opinion that the writ of error was a waiver of the bill of exceptions. (*b*) A position which can scarcely be supported, since the writ of error is necessary to save the party from an execution before his bill of exceptions has been heard. This is an application to the discretion of the Court, and if there has been no unnecessary delay, the Defendant will not be deprived of his bill of exceptions. In *Dillon* v. *Parker* a year had elapsed; errors had been assigned; and the application was to compel the party to settle the bill of exceptions, not simply to return it as here.

Wilde Serjt., on the same side, was stopped by the Court.

Cross and *Andrews* Serjts. relied on *Dillon* v. *Parker*, and complained of the delay from the end of *December* to the last day but one of *Hilary* term.

TINDAL C. J. The cause was tried on the 23d of *December*; the bill of exceptions was drawn up and

(*a*) 1 *Bingh.* 17. (*b*) See 11 *Price*, 102.

1830.
WILLANS v. TAYLOR.

tendered before the cause was over; on the 11th of *February* the bill was presented in an extended form to the Judge who presided, and at his suggestion a copy was furnished to the other side, to ascertain if it met their view of the case. It has not been contended that the bill ought to have been reduced to form before the expiration of the first four days of the term, and the utmost delay that can be complained of is from the 28th of *January* to the 11th of *February*. That is not such delay as to entitle the party to retain and take no notice of a paper sent to him for approval or disapproval, and which, whether he agree or disagree with its contents, must be submitted to the Judge who presided, for his acceptance before signature. The question, whether a court of error will attend to a bill of exceptions appended to a writ of error, does not arise upon the present occasion, and no ground has been shewn for discharging the Judge's order.

PARK J. The party who has tendered the bill of exceptions is entitled to have it returned; and whether the other side agree to it or not, the Judge who presided must exercise his discretion as to signing it, and he is not bound to sign if the statement of facts be erroneous. When he shall have signed, it will be for the court of error to say, whether they will admit it or not.

GASELEE J. The party ought not to retain this paper: he is bound to express his assent or dissent, and then to return it.

BOSANQUET J. concurring, the rule was

Discharged.

TOPHAM *v.* DENT.

May 6.

Plaintiff, a prisoner, assigned all his effects, under the insolvent debtor's act, *June* 17. His wife continued to reside in his house, retaining some of the furniture. On the 9th *July*, the wife having been absent for two days, and no one being in the house, Defendant committed a trespass in an attempt to distrain for rent:

Held, that the wife had not a sufficient possession to enable the Plaintiff to sue in trespass.

TRESPASS. The Defendant, as the bailiff of *Imber*, went on the 9th of *July* last to a house which *Imber* had let to the Plaintiff, to distrain for rent arrear. Finding the door closed and the house empty, he picked the lock, and made a distress, but the whole effects in the house were insufficient to cover the sum in arrear, 12*l*. The Plaintiff was in prison, and his wife, who had continued to reside in the house after he went to prison, had not been seen there for two days, but was sent for at her mother's, where it appeared she was staying.

The Plaintiff had petitioned the insolvent debtors' court for his discharge on the 17th of *June*, when his interest in the premises was assigned to the provisional assignee, and the effects now distrained were all inserted in Plaintiff's schedule.

A verdict having been found for the Defendant, at the *Middlesex* sittings after last *Michaelmas* term, on the ground that the plaintiff had neither property nor possession to maintain trespass,

Andrews Serjt. moved to set it aside, on the ground that the house was constructively in the possession of the Plaintiff, his wife being near at hand, and apparently in the actual occupation, though at the moment on a visit to her mother.

Wilde Serjt., who shewed cause, argued, that after the assignment to the provisional assignee, the Plaintiff had no longer any property in the house, and could not sue except by the consent of his assignees. The in-

1830.

TOPHAM v. DENT.

terest in the term and in the goods all passed to the assignee: *Doe* v. *Andrews* (*a*), *Crofts* v. *Pick.* (*b*)

Andrews, in support of his rule, argued, that the absence of the wife for a short interval, as on a visit, did not interrupt the constructive possession of the premises, which must be taken to have been enjoyed with the assent of the assignee, unless the contrary appeared.

TINDAL C. J. I am of opinion, that this verdict ought not to be disturbed. In order to maintain the action, the Plaintiff ought to have had possession actual or constructive; but in the present case, the property was all out of the Plaintiff. His term was vested in the assignee by the assignment of *June* 17th, and the goods were all enumerated in the Plaintiff's schedule. The property not being in him, had he the possession? So far from it, he was in prison, and his wife had not been on the premises for two days; and it would be too much to say that her being accidentally called for on the occasion of the distress amounted to a constructive possession with the assent of the assignee.

PARK J. concurred.

GASELEE J. The interest in the house was vested in the assignee, and the action would not lie without clear evidence that the wife at least was in possession with the assent of the assignee. No such evidence was given at the trial, and therefore the rule must be discharged.

BOSANQUET J. concurring, the rule was

Discharged.

(*a*) 4 *Bingh.* 348. (*b*) 1 *Bingh.* 354.

1830.

BRIGGS *v.* SHARP.

May 8.

The decision of a Judge of assize in remanding a prisoner under the Lords' act is final up to the time of remanding.

THE Defendant, a prisoner in *Lincoln* gaol, was brought up at the last *Lincoln* assizes, before the Judge of assize, under the Lords' act, and remanded, on the Plaintiff opposing his discharge, and giving a note to allow him his sixpences.

Ludlow Serjt. had obtained a rule *nisi* for his discharge, on the ground, as appeared by affidavit, that the Plaintiff had not signed the note in Court; that no affidavit, verifying the Plaintiff's signature to the note for the allowance of the sixpences had been delivered to the Defendant; and that the note itself had been delivered to him, not in Court, but by the gaoler after he returned to prison.

It appeared, however, that the affidavit with the note attached to it, had been handed up to the Judge for his inspection.

Goulburn Serjt. shewed cause. The matter has been determined by the Judge of assize, the only competent tribunal; and this Court has no authority to interpose except in matters occurring subsequently, as the non-payment of the sixpences.

From the statement, however, that the affidavit was handed up to the Judge for his inspection, it may be presumed that the affidavit had reached the prisoner's hands, and that he had suggested some enquiry.

Ludlow in support of his rule contended, that the Court had authority to investigate the proceedings below; and that they would be astute to favour the liberty of the subject.

1830.

BRIGGS v. SHARP.

TINDAL C. J. I think we have no authority to interfere in this case. The statute enacts, that the Court shall make a rule to discharge the insolvent upon his executing an assignment of his property, unless the creditor insist upon his being detained, and agree in writing to pay him 3*s.* 6*d.* a week. (*a*)

Upon this enactment the Courts have introduced, as a matter of practice, that the note given by the Plaintiff shall be signed in open court, or that his signature shall be verified by affidavit. But, first, we must intend that the court below pursued the regular practice, and no case of application to the court above can be cited which has not arisen upon matter subsequent to the remanding of the prisoner; and, secondly, there is enough before us to lead us to infer, that what was done was done correctly. It is not probable that the affidavit and note would have been handed up to the Judge except to enable him to satisfy himself upon some objection taken by the prisoner.

PARK J. I am of the same opinion. However inclined to assist a prisoner, we must not take upon ourselves a jurisdiction that is not in us. Except for matter arising subsequently, the act precludes us from entering on a case after the Judge of assize has dealt with it. And here we may presume he dealt with it correctly, for except upon objection by the prisoner, it is not probable the affidavit and note should have been handed up to the Judge.

GASELEE J. The power of discharging or remanding the prisoner rests solely with the Judge of assize; and after he has remanded, the Court here cannot discharge, except upon the failure of the Plaintiff to per-

(*a*) See 32 *G.* 2. *c.* 28. *s.* 13. 37 *G.* 3. *c.* 85. *s.* 3, 4.

form

1830.

BRIGGS v. SHARP.

form his undertaking. The course of the Judge of assize has varied occasionally, according to the practice of the place. But the words of the act have in this instance been strictly complied with. The Judge must have enquired into the case; for except upon some objection it is not likely the documents would have been handed up to him, and his direction respecting them would be final.

BOSANQUET J. I have entertained some doubts, because the note was not handed to the prisoner till his return to the prison; and the affidavit, as it is stated, not at all, which is contrary to the ordinary practice: at the same time they were handed to the Judge in Court, so that there was no want of compliance with the words of the act. After he has exercised his judgment on the facts, I agree that this Court has no power to review his decision, and on that ground I think the rule should be discharged.

Rule discharged.

DICAS *v.* JAY.

May 10.

Plaintiff had sued Defendant for negligence, *per quod* Plaintiff became liable to pay certain sums, and lost the custom of *A.*, *B.*, and *C.* The cause was referred under an order of N. P., by which Plaintiff was precluded from bringing any new action. The arbitrator made an award in favour of Plaintiff, who nevertheless sued Defendant again, the new declaration differing from the old one, in stating that Plaintiff *had* paid the money he before alleged himself *liable* to pay, and had lost the custom of *D.*, *E.*, and *F.*:

Held, that the Court could not stay proceedings on a summary application.

THE Plaintiff, in a declaration of several counts, had sued the Defendant for negligence as an attorney in the conduct of a suit; and alleged that he the Plaintiff

1830.

DICAS v. JAY.

had incurred certain liabilities as the consequence of this negligence, and had lost the employment of certain persons who would otherwise have employed him.

The matter was, by an order of *Nisi Prius*, afterwards made a rule of Court, referred to an arbitrator, who directed a verdict generally for the Plaintiff for 23*l.* 14*s.* 10*d.* The order by which the cause was referred precluded the Plaintiff from bringing any new action.

The Plaintiff, however, now commenced a fresh action against the Defendant, the declaration in which was the same as in the preceding action, with the addition, that the Plaintiff alleged himself to have paid certain sums, for which he had before only alleged himself to be liable, and named certain other persons who had ceased to employ him in consequence of the Defendant's negligence.

Cross Serjt. obtained a rule *nisi* to stay the proceedings in this second action, on an affidavit alleging that it was brought for matters which were included in the award. In *Dunn* v. *Murray* (*a*) the declaration stated, that in consideration that the plaintiff, at the request of the defendant, would enter into the employ of the defendant in a certain capacity for a year, at the rate of five guineas per week throughout the year, defendant undertook to employ him for a year, and alleged as a breach, that the defendant dismissed the plaintiff from his employ before the end of the year, without any reasonable or probable cause. The declaration contained counts for wages, and for work and labour, &c. The cause, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages he would have been entitled to receive from

(*a*) 9 *B.* & *C.* 780.

the

1830.

DICAS v. JAY.

the defendant on the day when the action was commenced. No claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and the dismissal, might amount to such a claim. The plaintiff having afterwards brought an action to recover a compensation in damages in consequence of the dismissal from the defendant's employ before the end of the year, it was held, that the award of the arbitrator was a bar to such action.

Wilde Serjt., who shewed cause, relied on an affidavit in which it appeared that the learned Judge before whom the former cause was about to be tried had expressed an opinion, that the damage complained of in the present action might form the subject of a second suit. He pointed out the difference between the two declarations as above; and contended, that the Court would not try summarily, on affidavit, a doubtful question, which the Defendant might bring to issue by pleading.

Cross Serjt. This action is a violation of the rule of Court, for which the Plaintiff is liable to an attachment; but, if the Defendant waives the graver proceeding, the Court may interfere in support of its own order.

TINDAL C. J. This is an application to stay proceedings, on the ground that a former action for the same cause has been referred to an arbitrator under a rule of Court, and that this proceeding is a violation of that rule. It is, therefore, only a milder mode of moving for an attachment. When the former cause was referred, the learned Judge who was about to try it expressed an opinion, that the damage now complained of

1830.

DICAS v. JAY.

of might form the subject of a separate action. Under these circumstances, it is difficult to say that the Plaintiff is guilty of a contempt in bringing a second action, although, upon looking at the Plaintiff's declaration, we think it would be mercy to him to make this rule absolute with costs. But we have no right to prevent him from proceeding if he chooses to do so, and therefore this rule must be discharged without costs.

PARK J. said he had considerable doubts.

GASELEE J. I am of opinion, that the recovery in the first of these actions may be pleaded in bar to the second; and I therefore agree that it would be mercy to the Plaintiff to make this rule absolute; but as we cannot go the length of saying there has been a wilful violation of the order of Court, the rule must be discharged if the Plaintiff insists on proceeding.

BOSANQUET J. concurred.

Rule discharged.

May 10.

MAXWELL *v.* MARTIN.

Trespass for breaking a close called *Lord's Leys*. Plea, right on *Brockeridge Common*, and that *Lord's Leys* was part of the common. Replication, no right on *Lord's Leys*.

At the trial, Plaintiff admitted that Defendant had a right on all *Brockeridge Common* except the portion called *Lord's Leys*, and Defendant admitted he had no evidence of any exercise of the right on *Lord's Leys*:

Held, that upon these pleadings and admissions, Plaintiff was entitled to judgment.

TRESPASS for breaking and entering Plaintiff's close, called the *Lord's Leys*.

Plea, that the supposed close called *Lord's Leys* is,

and

and at the said several times when, &c. was an open waste, and considered part of a certain common called *Brockeridge Common*; and that Defendant, and those whose estate he had, had a right to take stone from the open waste and uninclosed parts of *Brockeridge Common*, and in, upon, and from the *Lord's Leys*, as being an open, waste, and uninclosed part of *Brockeridge Common*.

The replication (after protesting that *Lord's Leys* was not an open, waste, and uninclosed part of *Brockeridge Common*,) alleged, that Defendant and those whose estate he had, had not a right to take stone from the close or parcel of land called the *Lord's Leys*. Upon which issue was joined.

At the trial the cause was conducted by admissions on both sides: the counsel for the Defendant admitting, that he had no evidence to prove the exercise of a right to take stone on the *Lord's Leys*; and the counsel for the Plaintiff admitting, that the Defendant had a right to dig stone upon *Brockeridge Common*, with the exception of the parts of it called the *Lord's Leys*; it being understood, according to the report of the learned Judge who tried the cause, that there was no fact in dispute between the parties for the consideration of the jury.

On this state of the pleadings, and these admissions as to the evidence, the verdict was entered for the Defendant, with liberty for the Plaintiff to move to enter a verdict for 1*s*. damages.

Accordingly,

Russell Serjt. having obtained a rule *nisi* to that effect,

Ludlow Serjt. shewed cause. The Plaintiff not having traversed the Defendant's right to take stone on *Brockeridge Common*, has, on the pleadings, admitted it; and

1830.

MAXWELL v. MARTIN.

and for want of a traverse, he has also (notwithstanding the *protestando*) admitted on the pleadings that the *Lord's Leys* is part of *Brockeridge Common*, and as every whole must contain all its parts, the admission of the right on *Brockeridge Common* involves the admission of a right on *Lord's Leys* as part of the common. It is impossible, therefore, that any judgment can be entered for the Plaintiff on this record. In *Moorewood* v. *Wood* (*a*) it was held, that, if to an action of trespass in the common called *A.* the defendant plead that *A.* and *B.* commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the *whole* prescription. And in *Rotheram* v. *Green* (*b*), where the defendant pleaded a right of common in respect of a tenement in *L.*, and the jury found that the defendant's ancestor released to the plaintiff's ancestor all his right and common in part of the land where he had the common, the Court held that "the common is entire through the whole land, wherefore a release in part shall discharge the whole," "and therefore the prescription is found against the defendant." Evidence of ownership, or of rights upon some parts of a waste, is, until rebutted, evidence of a right over the whole. *Tyrwhitt* v. *Wynn* (*c*), *Stanley* v. *White* (*d*), *Grose* v. *West* (*e*), *Rowe* v. *Brenton.* (*g*)

Wilde Serjt. and *Russell* in support of the rule. The qualified admission by the Plaintiff's counsel of the Defendant's right on *Brockeridge Common*, coupled with the admissions made by the Defendant, threw it on him to make out the affirmative, that he had a right on *Lord's Leys*. The present resistance is an attempt to elude by finesse the understanding come to by both parties on the trial.

(*a*) 4 *T. R.* 157.
(*b*) *Cro. Eliz.* 593.
(*c*) 2 *B.* & *A.* 554.
(*d*) 14 *East*, 332.
(*e*) 7 *Taunt.* 39.
(*g*) 8 *B.* & *C.* 737.

The

1830.

MAXWELL v. MARTIN.

The Court took time to consult *Vaughan* B., before whom the verdict was taken, and judgment was now delivered by

TINDAL C. J. Upon the pleadings in this case, the precise issue raised by the replication is, Whether the Defendant has a prescriptive right to dig stone in, upon, and from the close called the *Lord's Leys*; and it is admitted on the face of the pleadings, for the purpose of this cause, that the *Lord's Leys* was, at the time of the trespass committed, an open, waste, and uninclosed part of a certain common called *Brockeridge Common*.

The cause, instead of being tried by the actual production of evidence before the jury, was brought to a termination by the admission of the counsel on each side; the counsel for the Defendant admitting, that he had no evidence to prove the exercise of a right to take stone on the *Lord's Leys*; and the counsel for the Plaintiff admitting, that the Defendant had a right to dig stone upon *Brockeridge Common*, with the exception of the parts of it called the *Lord's Leys*; it being understood, according to the report of the learned Judge who tried the cause, that there was no fact in dispute between the parties for the consideration of the jury.

On this state of the pleadings, and this mutual understanding of the condition in which the parties stood as to the evidence, the verdict was entered for the Defendant, with liberty for the Plaintiff to move to enter a verdict for 1*s*. damages, which is now sought to be done on the rule obtained for that purpose, and which rule, we think, ought to be made absolute.

The original grant of the right of digging stones upon *Brockeridge Common*, on the foundation and in the place of which grant the prescription now stands, might either have been a general grant to dig stone over the whole common, or a grant to dig stone over the whole com-

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1830.

MAXWELL v. MARTIN.

map, with the exception of the *Lord's Leys*. But the affirmative of the issue is upon the Defendant. He must shew affirmatively, either that the original grant, or the prescriptive right set up in the plea, does comprehend the whole common without any exception. So that, if the original grant cannot be produced, and the evidence as to the prescriptive right over the part called the *Lord's Leys* hangs in even scales, the balance must be declared in favour of the Plaintiff, inasmuch as the burden of making the scale preponderate is cast upon the Defendant.

Now, if the case had gone to the jury upon the actual production of evidence, the right to take stones upon the *Lord's Leys* would have depended, not merely on affirmative evidence of the exercise of that right on the particular spot; but as the Defendant had evidence of the exercise of the right of getting stone on the whole of *Brockeridge Common*, the jury might have inferred the right as to the particular spot in dispute, from the mode and circumstances under which the right was exercised over the residue of the common, and not exercised as to the *Lord's Leys*. Thus, the situation of the *Lord's Leys*, the quantity and value of the stone under it, its accessibility or convenience with respect to the tenement of the Defendant, might have been important evidence, either to support or to negative the inference as to the exception of the *Lord's Leys* from the original grant, or from the prescriptive right.

But as this was well known to the counsel on both sides, we take the admission made at the trial as a general admission, not only that there was no direct affirmative evidence to support the issue as to the *Lord's Leys*, but none that would raise an inference in support of it; and, therefore, upon the whole, we think the Defendant has not proved his issue, and that the rule obtained must be made absolute.

Rule absolute.

1830.

FORSTER and Another *v.* WESTON.

May 10.

THE Defendant was arrested for 1123*l.*, and the Plaintiffs at the trial consented to take a verdict for 716*l.*

Defendant having been arrested for 1123*l.*, when the Plaintiffs had the means of knowing that only 716*l.* was due, was held entitled to his costs under 43 *G.* 3. *c.* 46., although the accounts between Plaintiffs and Defendant were somewhat complex.

Wilde Serjt. obtained a rule *nisi* to tax the Defendant his costs under 43 *G.* 3. *c.* 46., as for an arrest without probable cause, upon affidavits which alleged that at the time of the arrest the Plaintiffs had in their hands 407*l.* of the Defendant's money, which reduced their real demand to 716*l.*, the sum recovered; that the account on which this balance was due stood in the joint names of the Defendant and another, but that the Plaintiffs had, upon an arrangement between them, been accustomed to pay each of them separately a moiety of the sums that became due to the two. He cited *Dronefield* v. *Archer*. (*a*)

The Plaintiffs in answer alleged that the Defendant was about to leave the country when he was arrested. They admitted that 407*l.* was due to the Defendant as his moiety upon the joint account, and did not expressly deny that they knew this to be the amount of his moiety at the time of the arrest.

Taddy Serjt., who shewed cause, contended that there was no ground for calling this a malicious or vexatious arrest, since the disproportion between the sum sworn to and the sum recovered was not immoderate, and the

(*a*) 5 *B.* & *A.* 513.

Plaintiffs

1830.

FORSTER v. WESTON.

Plaintiffs might well have been misled by the joint account.

TINDAL C. J. I think this case falls within the statute of 43 G. 3., and that the Plaintiffs had not reasonable or probable cause for arresting the Defendant for 1123*l*. If, indeed, they had really believed that they were not safe in dividing the joint account, that might have given a different complexion to the affair; but they admit that they afterwards divided the amount, and they have not stated that they did not know it was to be divided previously to the arrest.

PARK J. The balance is the sum due. The Plaintiffs knew that something was due from them to the Defendant which would reduce the amount for which they arrested him, and they had no probable cause for arresting him for more than the balance. In a great variety of decisions it has been laid down that the rule upon these motions is the same as in actions for a malicious arrest.

The rest of the Court concurred, and the rule was made

Absolute.

1830.

CHALIE and Another *v.* BELSHAW.

May 10.

Averment, that Defendant accepted a bill, sufficient on special demurrer, although the stat. 1 & 2 *G.* 4. requires an acceptance in writing.

THE declaration stated that the Defendant, according to the usage and custom of merchants, accepted a bill of exchange drawn by the Plaintiffs, and thereupon became liable to pay the amount according to the tenor of the said bill.

Breach, non-payment. Special demurrer, on the ground that it was not stated that the Defendant accepted the bill of exchange in writing, or that the acceptance of the same was in writing; and also for that it was stated that the Defendant accepted the bill of exchange according to the usage and custom of merchants, and by the usage and custom of merchants an acceptance by parol without writing would have been sufficient, whereas by a certain act of parliament passed in the first and second years of the reign of King *George* the Fourth, the acceptance of the bill of exchange, to be valid, must be in writing.

Jones Serjt., in support of the demurrer, urged that the declaration ought to state all that the statute required. But

The Court held the declaration sufficient, and that there was nothing in the objection.

Judgment for the Plaintiff.

1830.

May 10.

MURRAY *v.* NICHOLS and Others.

In an action on the case for a malicious prosecution, *per quod* Plaintiff was falsely imprisoned, one of several Defendants obtaining a verdict, is not entitled to his costs under 8 & 9 *W.* 3. *c.* 11. if a verdict pass against the others.

THE Plaintiff had sued the Defendants in case; and his declaration contained counts for a malicious prosecution; counts for a libel; and trover for a trunk. In the count for a malicious prosecution he had stated his imprisonment as a consequence and aggravation of the malicious charge.

A verdict was found for the Plaintiff against some of the Defendants, while others were acquitted, but the prothonotary having declined to allow them their costs,

Jones Serjt. obtained a rule *nisi* to review his taxation; against which

Wilde Serjt. was to have shewn cause, but the Court called on

Jones to support his rule. At common law where a verdict was found against one of several defendants in an action of *tort*, the others who were acquitted had no claim for costs. To remedy this the statute 8 & 9 *W.* 3. *c.* 11. *s.* 1. gives costs to any of several defendants who obtain a verdict in actions of trespass, assault, false imprisonment, and *ejectione firmæ*. This statute, considering the reason of its passing, ought to be construed liberally, and with a view to the object, not the form, of the action in which a defendant may be engaged; for if it had been intended that the remedy should have been confined to the form of action, it would have been only necessary to specify the action of trespass, since that includes all that are named in the statute. But it was meant

meant to give the costs wherever a false imprisonment was the subject of the action, whether under the form of trespass or case; and here the declaration stated that the Plaintiff was falsely imprisoned. In *Dibben* v. *Cooke* (*a*) the Court said, "Before the statute of 8 & 9 *W.* 3. *c.* 11. if one defendant was acquitted, he was not entitled to his costs, the Courts construing the former acts to relate only to the case of a total acquittal of all the defendants. This being inconvenient, the 8 & 9 *W.* 3. *c.* 11. came, and gave costs where one of the defendants is acquitted, unless the Judge certifies a reasonable cause to make him a defendant. And that act extends to trespass, assault, false imprisonment, and ejectment." But the action there being for a nuisance, the Court thought it did not come within the act. *Ingle* v. *Wordsworth* (*b*), where the costs were refused, was an action of replevin; and *Marriner* v. *Barrett*, cited in that case, was an action of trover. But no case has decided that costs shall be withheld where false imprisonment is the subject, though not the form of the action.

TINDAL C. J. The rule cannot be laid down with greater accuracy than by Lord *Hardwicke* in the case referred to. "The act extends to trespass, assault, false imprisonment, and ejectment. The present action is trespass on the case: and though that be a species of trespass, and in the case of the statute of limitations, the word *trespass* in the proviso has been extended to actions on the case; yet, considering these acts giving costs have always been looked on as penal acts not to be extended by equity, and, therefore, an avowant not within the word plaintiff, *Carth.* 179., we must take it only to mean the general sort of trespass *vi et armis*: 10 *Rep. Marshalsea* case." And the question is, whether this act can be

(*a*) 2 *Str.* 1006. (*b*) 3 *Burr.* 1284.

1830.

MURRAY v. NICHOLS.

construed in the manner now required. The words of the act are, "where several persons shall be made defendants to any action, or plaint of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them shall be, upon the trial thereof, acquitted by verdict, every person or persons so acquitted shall have and recover his costs of suit in like manner as if a verdict had been given against the plaintiff or plaintiffs and acquitted all the defendants, unless the Judge, before whom such cause shall be tried, shall immediately after the trial thereof, in open court, certify upon the record under his hand, that there was a reasonable cause for the making such person or persons a defendant or defendants to such action or plaint." And it appears to me that this declaration does not come within those words. An action of false imprisonment means an action brought directly for the imprisonment; but here the imprisonment is stated only as matter of aggravation incidental to the principal charge; it is clearly not the gist of the action, and the very beginning of the declaration, "was attached to answer the plaintiff for plea of *trespass on the case*," puts the Defendant out of court.

PARK J. and GASELEE J. concurred.

BOSANQUET J. By the action of false imprisonment, the statute meant an action brought for the imprisonment directly, and not as consequential damage.

Rule discharged.

1830.

FENN dem. THOMAS THOMAS *v.* GRIFFITH and Another.

May 10.

Ejectment. Plaintiff's witness proved an acknowledgment by the Defendant, that he held under *T.*, and stated that he, witness, had drawn an agreement touching the premises between Plaintiff and *T.*:

Held, that Plaintiff was bound to produce the writing.

EJECTMENT. At the trial before *Goulburn* Serjt. last *Pembroke* great sessions, the lessor of the Plaintiff claimed under a lease from the mayor, bailiff, and burgesses of *Tenby* made in 1788, which was put in and read. A witness for the Plaintiff then proved, that the Defendants succeeded to and claimed under *Alexander Thomas*, who occupied the premises before them. The witness said he had drawn an agreement or lease concerning the premises, between the lessor of the Plaintiff and *A. Thomas:* he had often heard *A. Thomas* say he held the premises under the lessor of the Plaintiff, but never heard him say any thing about the agreement or lease. The Defendant had received a notice to quit without objection. The writing mentioned by the witness was not produced, but a verdict having been taken for the Plaintiff, with leave for the Defendant to move to enter a nonsuit,

Russell Serjt. obtained a rule *nisi* accordingly, on the ground, that it having appeared by the Plaintiff's own witness that the premises had been demised by a writing, it ought to have been produced as the best evidence of the duration of the term: *Brewer* v. *Palmer*. (*a*)

Ludlow Serjt. shewed cause. There was no reason for producing the writing, unless it had also appeared to apply to the time of which the witness was speaking. It might have been an expired lease; and the Defendant had never himself acknowledged its existence. At all events, there was no question here about the terms of

(*a*) 3 *Esp.* 213.

1830.

FENN v. GRIFFITH.

the writing, the only dispute was, whether the Defendant held under the Plaintiff, and that was virtually admitted by his not objecting to the notice to quit.

In *Brewer* v. *Palmer*, the plaintiff was not permitted to recover in an action for use and occupation, without producing a written instrument under which the defendant held: but that case is distinguishable on the ground, that the amount to which the Plaintiff was entitled must have been expressly specified in the instrument.

TINDAL C. J. The Plaintiff here, who claimed an interest adverse to the Defendant, ought to have produced the writing when its existence was shewn by his own witness.

PARK J. As the Plaintiff's own witness stated there was a writing, the Court was bound to see the nature of the instrument.

BOSANQUET J. (*a*) I am of the same opinion: the Plaintiff himself made the writing material, and ought to have produced it.

Rule absolute.

(*a*) *Gaselee* J. was at Chambers.

May 14.

FORD *v.* BERNARD.

Demand of particulars of a notice of set-off delivered after a plea which was a nullity: Held, no waiver of the Plaintiff's right to sign judgment.

DEBT. The Defendant pleaded *non assumpsit*, and gave notice of set off. The Plaintiff took out a summons for particulars of the set-off, but afterwards signed judgment as for want of a plea. The action was brought to recover 6*l.* 1*s.*

Bompas Serjt. with an affidavit of merits, obtained a rule *nisi* to set aside this judgment, on such terms as the Court

1830.

FORD v. BERNARD.

Court should impose. He contended that the Plaintiff had waived the irregularity of the plea of *non assumpsit*, by taking out a summons for the particulars of set-off. In *Margerem* v. *Makilwaine* (*a*), it was held, that the Plaintiff by taking a plea out of the office, waived the objection that it was a nullity.

Wilde Serjt. shewed cause. This plea is not merely irregular but null, and there can be no waiver of a nullity. In *Margerem* v. *Makilwaine*, the plea was good on the face of it, and merely irregular as not having been put in by the attorney in the cause.

Bompas. After an affidavit of merits, it has always been the practice to allow the Defendant to try the cause upon *some* terms; as, paying all costs and putting the Plaintiff in the same situation.

TINDAL C. J. This judgment is regular; the Defendant has put in a plea not adapted to the nature of the action. It has been decided that *non assumpsit*, if pleaded to a declaration in debt, is a nullity (*b*); and we do not think any waiver of this nullity has taken place, by the Plaintiff's afterwards calling for the particulars of a notice of set-off; the notice forms no part of the record, and what has been done does not affect the matter on record. There is a manifest distinction between a mere nullity, and a plea good on the face of it, which was the case in *Margerem* v. *Makilwaine*.

It comes then to the question, whether we are in all cases to set aside a regular judgment upon a mere affidavit of merits, and imposing terms on the Defendant. Before doing so, we may no doubt look into the particulars of the cause, and when we find that this is an

(*a*) 2 *N. R.* 509. (*b*) See *Perry* v. *Fisher*, 6 *East*, 549.

1830.

FORD v. BERNARD.

action to recover no larger a sum than 6*l.* 1*s.*, and the Defendant asks us to allow him to pay a considerable amount for the purpose of going to trial, we think it mercy to him to discharge the rule.

Rule discharged, with leave for the prothonotary to inquire into the case.

May 14.

TAYLOR and Another, Assignees of MELLERS, an Insolvent, *v.* LANYON.

A landlord, who seizes his tenant's goods under an execution, the proceeds of which he is obliged to refund to the assignees of the tenant under 7 *G.* 4. *c.* 57. *s.* 34. cannot retain against the assignees the amount of a year's rent under the 8 *Ann. c.* 14. *s.* 1.

THIS was an action of *indebitus assumpsit.*

The declaration contained counts for money had and received by the Defendant to the use of the insolvent; money lent and advanced, and paid, laid out, and expended by the insolvent for the use of the Defendant; and upon an account stated between the Defendant and the insolvent. Also counts for money had and received by the Defendant to the use of the Plaintiffs, as assignees of the said insolvent; and upon an account stated between the Defendant and the Plaintiffs, as assignees as aforesaid. The Defendant pleaded the general issue.

At the trial of the cause before *Tindal* C. J., *London* sittings after *Easter* term last, a verdict was found for the Plaintiffs, damages 130*l.*, subject to the opinion of the Court on the following case: —

The insolvent, before and at the time of the issuing of the writ of execution thereinafter mentioned, was possessed of a certain house in *Norfolk Street, Strand*, in the county of *Middlesex*, as tenant thereof to the Defendant, under a lease for a term of years, then unexpired; and also of certain goods and chattels, being the furniture in the said house.

On

1830.

TAYLOR v. LANYON.

On the 31st of *May* 1828, the insolvent being indebted to the Defendant in the sum of 30*l.* for fixtures on the same premises, and in the sum of 50*l.* for part of the consideration for the lease of the said house, executed a warrant of attorney, giving authority to enter up judgment at the suit of the Defendant for the said respective sums of 30*l.* and 50*l.* Final judgment was signed thereon on the 30th of *June* 1828, and a writ of *fieri facias* upon the said judgment, at the suit of the Defendant, was issued on the same day against the goods and chattels of the insolvent.

On the said 30th of *June* 1828, there was one year's rent due from the insolvent to the Defendant under the said lease, and the Defendant gave notice of the same being so due to the sheriff's officer, to whom the writ of execution was delivered, and at the same time required him to retain the same out of the proceeds of the said execution to satisfy the Defendant for the said rent.

On the 1st of *July* 1828, the lease, goods, and chattels of the insolvent were taken in execution under the said writ, and on the 18th day of the same month were sold under and by virtue of such execution, and produced 217*l.* 13*s.* 6*d.*

The sum of 130*l.* for the said rent due to the Defendant was deducted from the said sum of 217*l.* 13*s.* 6*d.*, the proceeds of the said sale, and on the 7th of *August* paid over to the Defendant by the said officer; and the balance, after further deducting the several sums due for taxing and incidental expenses, was paid into court in this action.

On the 14th of *June* 1828 the insolvent surrendered himself to prison in discharge of his bail, and continued in prison from that time until his discharge thereinafter mentioned.

On the 19th of *July* he filed his petition in the court for the relief of insolvent debtors in *England* under and in

1830.
TAYLOR
v.
LANTON.

in pursuance of the act passed in the seventh year of his present majesty's reign, intituled An Act to amend and consolidate the laws for the relief of insolvent debtors in *England*; and, on the 24th of *September* 1828, the said insolvent was, under and in pursuance of the said act, discharged from imprisonment.

The Plaintiffs were the assignees of the estate and effects of the said insolvent, and duly appointed and constituted according to the said act.

The jury found that the said warrant of attorney was not given by way of fraudulent preference to the defendant.

The question for the opinion of the Court was, whether the Plaintiffs, as assignees of the insolvent, were entitled to recover from the Defendant the said sum of 136*l.* so paid to the Defendant?

If the Court should be of opinion that the Plaintiffs were entitled to recover, the verdict for the Plaintiffs was to stand; if not, a nonsuit was to be entered.

Taddy Serjt. for the Plaintiffs. The Defendant is not entitled to retain the amount of rent taken under the execution. The object of the insolvent debtors' act, like that of the bankrupt acts, is to effect an equal division of the debtor's property; and as far as respects the Defendant's warrant of attorney, he was compelled to refund the proceeds of the execution to the creditors, under the thirty-fourth section of 7 *G.* 4. *c.* 57. In *Notley* v. *Buck* (*a*) it was decided on the corresponding provision of the bankrupt act, 6 *G.* 4. *c.* 16. *s.* 108., that the creditors were entitled to recover from the sheriff in an action for money had and received the proceeds of an execution levied after the bankruptcy of the debtor upon a judgment by *nil dicit* suffered by him before. There is no

(*a*) 8 *B.* & *C.* 160.

exception

exception in favour of a landlord. And the statute 8 *Ann. c.* 14. *s.* 1., by which it is enacted that "no goods or chattels shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the premises by virtue of such execution, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent, provided the said arrear do not amount to more than one year's rent," applies only to cases where an execution creditor claims adversely to the landlord, not where the landlord is himself the execution creditor. The object of that statute was to protect the landlord against the frauds of tenants, particularly in colluding with creditors to deprive the landlord of the means of distraining for his rent; and it would lead to serious inconvenience if a landlord were permitted to levy his rent under an execution for a debt of a different description; the tenant would be deprived of the right of contesting in a replevin the amount of rent claimed, and would be divested of the protection afforded him by the various acts for the prevention of irregular distresses. It is plain that the execution cannot be supported under the judgment, and the statute 7 G. 4. would be rendered nugatory if the Defendant could effect that in the character of landlord which he is precluded from doing as a creditor. In *Lee* v. *Lopez* (*a*) the sheriff upon an execution by the landlord levied for him, as rent arrear, 140*l.* beyond the amount of the execution debt; but the tenant having previously committed an act of bankruptcy, it was held that his assignees were entitled to the money. That case cannot be distinguished from the present. And it has not been the practice of the courts to give a more extended con-

(*a*) 15 *East*, 231.

struction

1830.

TAYLOR v. LANYON.

struction to the statute of *Anne*; for in *Brandling* v. *Barrington* (*a*), where the sheriff had retained a sum for rent on executing on the tenant a writ of *pone per vadios*, which it was held he ought not to do, Lord *Tenterden* said, "The process under which the sheriff seized and sold the goods in question was not process of execution on a judgment; it was not therefore within the words of the statute. But it is said that it was within the equity. Speaking for myself alone, I cannot forbear observing, that I think there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the legislature might possibly have provided for other cases had their attention been directed to them."

Wilde Serjt. *contrà*. Under this execution the Defendant is entitled to retain the sum due to him for rent; for the thirty-fourth section of 7 *G.* 4. *c.* 57. does not avoid the execution, — *Taylor* v. *Taylor* (*b*), — resembling in that respect the 108th section of the bankrupt act, 6 *G.* 4. *c.* 16.; and *Moreland* v. *Pellatt* (*c*), comes nearer to the present case than *Notley* v. *Buck*. In *Moreland* v. *Pellatt*, judgment was entered up on a warrant of attorney given by two joint traders, and a *fi. fa.* issued, returnable on the 2d of *May*. On the 1st of that month the sheriffs' officer received from the Defendants the money directed to be levied. On the 2d of *May* one of them committed an act of bankruptcy, and the other on the 5th. On the 11th a commission of bankrupt issued, and on the 19th the sheriff paid over the money to the execution creditor. In an action by the assignees, it was held, that he was entitled to retain it, not being creditor having a security at the time of the

(*a*) 6 *B.* & *C.* 467. (*b*) 5 *B.* & *C.* 392. (*c*) 8 *B.* & *C.* 722.

bankruptcy.

1830.

TAYLOR v. LANYON.

bankruptcy. The acts of the sheriff in the present case were legal; the money was levied and became the property of the Defendant on the 18th; while the Plaintiffs, as assignees, have no title till the 19th, the date of the assignment. In *Lee* v. *Lopez* the sheriff was a wrong-doer, having seized after an act of bankruptcy, which distinguishes that case from the present. But the Defendant's claim as landlord is also protected by the statute of *Anne*. It is clear that, if he had gone through the formality of a distress just before the execution, he would have been entitled to the rent; and virtually he may be said to have done so: for under the statute of *Anne* the sheriff upon receiving notice of the rent due becomes the agent of the landlord, and is compelled to levy for the rent before he proceeds with the execution. No distress is actually made by the sheriff or the landlord; and one object of the statute was to avoid the conflict of two distinct claims to the same property in the custody of the law. And though as among traders the object of the law is an equal distribution of the debtor's property, yet it has never been intended to deprive the landlord of his priority; and the courts have summarily ordered the sheriff to pay over to him the money levied; *Gore* v. *Gofton* (*a*), *Darling* v. *Hill.* (*b*) In *Henchett* v. *Kimpson* (*c*), *Pratt* C. J. said, "The law gives this entry to the sheriff only by virtue of the execution, but after he has notice of rent being due to the landlord, he cannot remove the goods before he has satisfied the landlord one year's rent; the landlord shall have the like benefit of distress for one year's rent as if there had been no execution at all; unless the rent be paid, the sheriff must quit, and if he does not quit, a special action on the case lies against him after notice of the rent due; but there is a shorter way, by motion to the

(*a*) 1 *Str.* 643. (*b*) *Cas. Temp. Hardw.* 255. (*c*) 2 *Wils.* 140.

Court,

1830.

TAYLOR v. LANYON.

Court, as in the present case, that the landlord may have restitution to the amount of the goods the sheriff has sold." And in *Collier* v. *Speer* (*a*), the Court said, "The sheriff infringes the statute if, after notice of rent in arrear, he remove any of the goods without retaining that rent. The words of the statute are, 'No goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods off the said premises by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent, &c. And the sheriff or other officer is thereby empowered and required to levy and pay to the Plaintiff as well the money so paid for rent as the execution money.' It is clear that the sheriff must first levy for the rent and then for the execution. It would be a great hardship on the landlord to oblige him to watch the sheriff's officer for the purpose of seeing when the execution is finished, and whether or not sufficient distress is left behind. The statute requires no such thing." Then, this being an action for money had and received, the Plaintiff can only recover if he be entitled to the money in equity and good conscience; *Rastall* v. *Stratton* (*b*); and if the two parties are equally well entitled, *potior est conditio possidentis*. As there could have been no dispute if the Defendant had gone through the formality of a distress, he ought not to be deprived of his due when the residue for the creditors has been increased rather than diminished by the omission of that formality, all the ex-

(*a*) 2 *B.* & *B.* 67. (*b*) 2 *T. R.* 366.

penses

penses of which must have come out of the debtors' estate. The Plaintiff's title could not accrue till the 19th, while the Defendant was fairly in possession on the 18th, for the property in the goods is in the debtor till sale, and the money produced is at once the property of the creditor. In *Moore* v. *Pyrke* (*a*), Lord *Ellenborough* said, "Does the money produced by the sale vest in the first instance in the landlord or in the tenant? On the best consideration I can give it, I think the money does not vest in the tenant, but is an instantaneous executed satisfaction of the rent vesting to that amount in the landlord, and that the tenant has only an interest in the surplus, if any." And in *Ex parte Plummer* (*b*), cases are mentioned which shew how far the courts will go on that principle. In *Dixon* v. *Smith* (*c*) it was adjudged, that under a sequestration, the landlord was entitled to be paid arrears of rent. And in *Buckley* v. *Taylor* (*d*) it was held, that, if a trader after committing an act of bankruptcy, take a shop, and agree to pay half a year's rent in advance, where, by the custom of the country, half a year's rent becomes due on the day on which the tenant enters, the landlord, after an assignment under the commission, and before the year expired, may distrain the goods on the premises for half a year's rent; or if he buy the tenant's goods at the sale under the commission, he may retain the amount of the half year's rent. The landlord, therefore, having in this case, been fairly in possession of the money, and no better right having supervened, he is entitled to retain it.

Taddy. It is not in equity or good conscience, but by positive law, that a landlord is preferred to other

(*a*) 11 *East*, 54.
(*b*) 1 *Atk.* 103.
(*c*) 1 *Swanst.* 457.
(*d*) 2 *T. R.* 600.

creditors,

1830.

TAYLOR v. LANYON.

creditors, and if he omit the procedure prescribed by positive law, he has no superior claim. The action for money had and received is the only action, after a sale, in which the question can be tried, and effect be given to the principle of the insolvent debtor's act: *Notley* v. *Buck*. Except where a distress has actually been levied, that act supersedes the statute of *Anne*, and the principle established in *Lee* v. *Lopez* will decide the present case, although the facts may be somewhat different. The cases in Chancery do not apply to the present question, because in those cases the money was in the hands of the Judge in equity, and Lord *Tenterden* distinguished them on that ground in *Brandling* v. *Barrington*.

TINDAL C. J. The main question is, whether the right of the landlord to receive his rent in the mode he has here pursued, is protected by the statute of *Anne*. For, if his case be not within that statute, the rent, though apparently received under colour of law, has been received without authority, and has therefore been received to the use of the insolvent's assignees: and we are of opinion that the Defendant's case does not fall within the operation of the statute of *Anne*.

That statute was passed to protect the landlord against frauds which might be committed by his tenants, particularly by those colluding with creditors to issue writs of execution; for property so in the custody of the law could not be distrained, and the judgment creditor, by keeping possession for a length of time, might seriously affect the interests of the landlord. The statute, therefore, contemplated executions issued by third persons, and not by the landlord. The language is, No goods upon any tenements leased shall be taken by any execution, unless the *party* at whose suit the execution is sued out shall, before the removal of such goods by virtue of such execution, *pay to the landlord* of the premises

mises all such sums as as shall be due for rent: Provided, &c.

This clearly contemplates an adverse execution; a *jus tertii*, against which it proposed to protect the landlord. A different construction would be most unfair to the tenant, for the sheriff is directed not to levy the execution till the rent has been obtained. See what would be the situation of the tenant. The landlord, upon suing out execution for a small debt, might claim rent beyond what was due, and the tenant would not only be deprived of his replevin, but of the benefit of those statutes which were passed to protect him against irregularities in distress, and a hasty and improper sale of his goods. Under an execution the sheriff might sell at once: the landlord would obtain a greater advantage than he is entitled to, and the tenant be placed under a greater disadvantage. It seems to us, therefore, that the landlord under the circumstances of this case is not protected by the statute of *Anne*, and that the money sought to be recovered was had and received to the use of the insolvent's creditors.

PARK J. I was impressed with the argument that the action for money had and received does not lie; that, however, would only be an argument, supposing the Defendant's case to fall within the provisions of the statute of *Anne*. But I am clearly of opinion that it does not; for the statute supposes a writ *has* issued, when the landlord comes to claim his rent. It contemplates an adverse execution; and any other construction would be open to all the inconveniences which have been specified, by depriving the tenant of his replevin, and enabling the landlord to levy more rent than was due. The Defendant, therefore, having obtained the money in question by his own unauthorised act, is liable to refund it in an action for money had and received.

1830.

TAYLOR v. LANYON.

GASELEE J. For the reasons which have been given, I think this case is not within the statute of *Anne*; therefore the money paid to the Defendant in *August* was money had and received to the use of the assignees.

BOSANQUET J. I am of the same opinion. The statute of *Anne* was passed in contemplation of cases where the landlord's rights might be defeated by the intervention of a third person. In that case the sheriff is directed to levy and pay as well the money so due for rent as the execution money. There being no adverse execution here, the landlord might have distrained before he set the sheriff in motion. It has been insisted, however, that he might levy under the execution as much as he was entitled to distrain for rent; but if he were permitted to do that, the tenant would be deprived of his replevin, and other inconveniencies would ensue.

The rent, therefore, has been levied improperly; and, as it appears by what fell from *Holroyd* J., in *Notley* v. *Buck*, the action for money had and received is the proper remedy for the parties entitled.

Judgment for the Plaintiffs.

1830.

MORLEY *v.* FREAR.

May 14.

DEBT on bond for 2000*l.* conditioned for the payment of 1000*l.*

Plea,

That after the making of the said writing obligatory, to wit, on the 14th day of *November* 1828, to wit, at, &c. by a certain deed poll or writing of release, sealed with the seal of the Plaintiff, which said deed poll the said Defendant now brings into Court here, the date whereof is the same day and year last aforesaid; after reciting that under and by virtue of a certain deed of settlement, or other instrument, made upon the marriage of *Isabella Morley*, the then wife of the Plaintiff, with one *William Holgate*, gentleman, deceased, her former husband, and under and by virtue of the last will and testament of the said *W. Holgate*, the Plaintiff, was or would become entitled (in right of the said *Isabella* his wife, on the decease of her father, the Defendant,) to the principal sum of 750*l.*, being one moiety or half part of the sum of 1500*l.*, which, by such deed of settlement, or other instrument as aforesaid, the said Defendant had covenanted or otherwise bound himself that his heirs, executors, or administrators, should pay after his decease unto the said *W. Holgate*, his executors, administrators, or assigns; and which, under and by virtue of the said will of him the said *W. Holgate*, would become divisible between the said *Isabella Morley* and her son *William Frear Holgate*, in equal moieties or proportions; and after further reciting that the Defendant, in and by a certain bond or obligation bearing even date therewith, being the same writing obligatory as in the said declaration

A covenant not to sue upon a bond during the life of the obligor, and that if any person to whom the obligee should assign the bond should recover the principal, the obligee would pay the obligor during his life interest on the amount recovered: Held, no bar to an action by an assignee of the bond in the name of the obligee.

1830.

MORLEY v. FREAR.

tion was mentioned, became bound unto the said Plaintiff, his executors, administrators, and assigns, in the penal sum of 2000*l.* conditioned for the payment of the sum of 1000*l.* with statute interest for the same as therein mentioned; and that it had been agreed that, in consideration thereof, the Plaintiff and *Isabella* his wife should release unto the Defendant, his heirs, executors, administrators, and assigns, all their interest, title, claim, and demand whatsoever, in and to the said sum of 750*l.* and that the Plaintiff should not receive interest for the said sum of 1000*l.* during the life of the said Defendant, notwithstanding the said bond; and, further, that if the said bond should happen to be assigned by the Plaintiff, and the Defendant should be obliged to pay the interest thereof, the Plaintiff should repay or make good the same; it was by the said deed poll witnessed, that, in pursuance of the said agreement, and in consideration of the premises, and of the sum of 10*s.* of lawful *British* money to the Plaintiff and *Isabella* his wife, then paid by the Defendant, the receipt whereof was thereby acknowledged, the Plaintiff had remised, released, and for ever quitted claim, and, by the said deed poll or writing, did for himself, his heirs, executors, administrators, and assigns, remise, release, and for ever quit claim unto the Defendant, his heirs, executors, administrators, or assigns, and did fully and absolutely exonerate and discharge him, them, and every of them, of, from, and against all that the said sum of 750*l.* being the said *Isabella Morley*'s moiety, share, or proportion of the said sum of 1500*l.* as aforesaid, and all the estate, right, title, interest, property, benefit, claim, and demand whatsoever, of them the Plaintiff and *Isabella* his wife, and each of them, of, in, to, or out of the said sum of 750*l.* or the said sum of 1500*l.* and every or any part thereof respectively; and also all that the covenant, promise, agreement, and obligation in the said deed of settlement,

or

1830.

MORLEY v. FREAR.

or such other instrument as aforesaid, contained or expressed for payment of the said sum of 1500*l.*, and all benefit and advantage to be had or taken of, from, or by means of the said deed or instrument, or of any covenant, claim, matter, or thing therein contained, and also of, from, and against all and all manner of action and actions, suit and suits, cause and causes of action and suit, liabilities, sum and sums of money, claims and demands whatsoever, which the Plaintiff and *Isabella* his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, could or might have, claim, or demand, or if the said deed poll or writing had not been made, could or might have had, claimed, demanded or been entitled, in, to, upon, from, or against the Defendant, his heirs, executors, administrators, or assigns, in his, their, or any of their lands, tenements, goods, chattels, or effects, for or in respect of the said sums of 750*l.* and 1500*l.* or either of them, or by reason or on account of the said deed or other instrument, or of the breach or non-performance thereof, or otherwise howsoever in relation thereto, so and in such manner as that they the Plaintiff and *Isabella* his wife, their and each of their heirs, executors, administrators, or assigns, and all other persons claiming or to claim from, through, under, or in trust for them, any or either of them should not, nor could nor might take, have, or receive any advantage, or otherwise avail himself or themselves of the same in any manner howsoever; and the Plaintiff did thereby for himself, his heirs, executors, and administrators, amongst other things, covenant, declare, and agree with and to the Defendant, his heirs, executors, administrators, and assigns, that the Plaintiff, his heirs, executors, or administrators, should not require payment of the said sum of 1000*l.*, nor claim or demand any interest for the same during the life of the said Defendant; and that in case the said bond should be

1830.

MORLEY v. FREAR.

assigned by him the Plaintiff to any person or persons who should claim or demand, and receive of and from the said Defendant interest for the said sum of 1000*l.* he, the Plaintiff, his heirs, executors, or administrators, should and would repay unto the said Defendant all such sum and sums of money as he should so pay for such interest; and in case he the Defendant should be required by any assignee or assignees of the said bond to pay the said principal sum of 1000*l.* then that he the said Plaintiff, his heirs, executors, or administrators, should and would pay unto the Defendant statute interest for the same during the term of his natural life, as by the said deed poll, reference being thereunto had, will, amongst other things, more fully appear; and this he the said Defendant is ready to verify; wherefore, &c.

Replication,

That after the making of the said writing obligatory in the said declaration mentioned, and after the making of the said deed poll or writing of release in the said plea mentioned, and before the commencement of this suit, to wit, on the 7th day of *November* 1829, to wit, at, &c. by a certain indenture then and there made between the said Plaintiff of the one part, and one *Henry Fitzwilliam Baker* of the other part; one part of which said indenture, sealed with the seal of the said Plaintiff, the said Plaintiff brings into Court here, the date whereof is a certain day and year therein in that behalf mentioned, to wit, the day and year last aforesaid; after reciting, as therein is particularly recited, in consideration of the sum of 1000*l.* of lawful *British* money before the execution of the said indenture, lent and advanced to the Plaintiff, by the said *H. F. Baker*, and then due and owing to him the said *H. F. Baker*, the receipt whereof the Plaintiff did by the said indenture acknowledge; and also in consideration of the sum of 10*s.* of like lawful money to the Plaintiff then

then paid by the said *H. F. Baker*, the receipt whereof was thereby acknowledged, he the Plaintiff did bargain, sell, assign, transfer, and set over unto the said *H. F. Baker*, his executors, administrators, and assigns, the said writing obligatory in the said declaration mentioned; and also the penal sum, and all benefit and advantage whatsoever to be had or derived therefrom, and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the Plaintiff in, to, or concerning the same, to have and to hold the said writing obligatory, penal sum, and other the premises, by the said indenture assigned or intended so to be, unto the said *H. F. Baker*, his executors, administrators, and assigns, to and for his and their own proper use and benefit; and for the better and more effectually enabling the said *H. F. Baker*, his executors, administrators, and assigns, to enforce the payment of, and to receive the monies due or to become due upon the said writing obligatory, he the Plaintiff did, by the said indenture, make, depute, constitute, and appoint the said *H. F. Baker*, his executors, administrators, and assigns, his true and lawful attorney and attorneys irrevocable for him the Plaintiff, and in his name and in the name or names of his executors or administrators, but for the sole and proper use and benefit of the said *H. F. Baker*, his executors, administrators, and assigns, to demand, sue for, recover, and receive of and from the Defendant and all and every other the person and persons to whom it should and might belong to pay the same, all and every the sum and sums of money then or at any time, and from time to time thereafter to grow, or become due, or be payable upon or by virtue of the said writing obligatory, and on non-payment thereof, to use and take all such lawful and equitable ways and means for obtaining or recovering the same as should be deemed necessary or expedient in that behalf, and on payment thereof to

1830.

MORLEY v. FREAR.

deliver up or cancel the said writing obligatory, and to give sufficient releases and discharges for the monies due thereon, and one or more attorney or attornies under him the said *H. F. Baker*, his executors, administrators, or assigns, for any of the purposes aforesaid to nominate, substitute, or appoint, and from time to time to remove and displace as he or they should think fit, he the Plaintiff thereby transferring and giving unto the said *H. F. Baker*, his executors, administrators, and assigns, his full power and authority in the premises, to every intent and purpose, and ratifying and confirming, and promising and agreeing to ratify and confirm all and whatsoever he or they should lawfully do or cause to be done in or about the premises by virtue of the said indenture, as by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear; and the said Plaintiff further said, that the writ in this suit was sued out, and that this action was brought and is prosecuted against the said Defendant in the name of him the said Plaintiff for and on the behalf of the said *H. F. Baker*, for the purpose of enabling him the said *H. F. Baker* to receive the said debt in the said writing obligatory mentioned, according to the form and effect, true intent and meaning, of the indenture, and solely for the use, benefit, and advantage of the said *H. F. Baker* as assignee of the said writing obligatory in the said declaration mentioned, and not for the benefit, advantage, use, or behoof of the said Plaintiff, to wit, at, &c., and that the said Plaintiff was ready to verify; wherefore he prayed, &c. Demurrer and joinder.

Cross Serjt. in support of the demurrer. The Defendant's bond and the Plaintiff's deed poll being reciprocal and simultaneous, the deed poll is a defeasance of the bond, and may be considered in the same light as a con-

1830.

MORLEY v. FRIAR.

a condition, for a defeasance operates as a condition. *Com. Dig. Defeasance.* The bond, therefore, was given upon condition that it should not be put in suit till after the death of the obligor, and this action is premature. In *Clayton* v. *Kynaston* (*a*), *K.* covenanted to pay 100*l.* at the death of *W.* *W.*'s executor sued *K.*, who pleaded another deed at the same time, whereby *W.* covenanted to indemnify *K.* from all agreements, &c. made before and after. *Per Curiam.* "If *A.* be bound to *B.*, and then *B.*, reciting the bond, covenants to save him harmless, this is an absolute defeasance; and if it be to save him harmless on a contingency, it is a conditional defeasance, *because it hath an express relation to the deed.*" And in *Burgh* v. *Preston* (*b*), upon a bond conditioned that *A.* should indemnify *B.* from all sums *B.* should pay on *A.*'s account, and before execution of the bond: memorandum endorsed, that *B.* hath given an undertaking not to sue upon the bond until *after A.*'s death: it was held, that the memorandum was part of the condition, and made the bond, in effect, payable by *A.*'s representatives.

Then, if the obligee is precluded from recovering, his assignee can stand in no better condition; for the assignee cannot take a larger right than the party assigning. And though it may be said, that the provision as to assignment would have been nugatory if the assignee were precluded from suing, the paramount intention must prevail, and the assignee, like the obligee, must postpone his action till the death of the obligor. The provision for paying the obligor interest, in case of an assignee's recovering against him, was inserted to meet a merely possible recovery, as if the obligor should have lost and been unable to avail himself of the deed poll.

Wilde, contrà, was stopped by the Court.

(*a*) 2 *Salk.* 574. (*b*) 3 *T. R.* 483.

TINDAL

1830.

MORLEY v. FRRAR.

TINDAL C. J. The question is, whether the deed poll set out on these pleadings operates as a defeasance of the bond which the plaintiff has declared on, or as a release of the action; for, unless such be the case, the Plaintiff is entitled to judgment.

The Plaintiff has declared on a bond conditioned for the payment of 1000*l.* The Defendant, in answer to this claim, sets up a deed, by which, after reciting that the Plaintiff had held a bond for 750*l.*, payable by the Defendant's executors, and that the Defendant had substituted for it a bond for 1000*l.*, the Plaintiff releases the bond for 750*l.*; covenants not to sue on the bond for 1000*l.* in the lifetime of the Defendant; and that if any other should sue in his name and recover, the Plaintiff would pay the Defendant, during his life, interest on the sum recovered.

It is impossible to overlook the distinction between two parts of this deed poll. The one, consisting of a release of a bond for 750*l.*, payable after the death of the obligor; the other, a covenant not to sue on the substituted bond. There are, no doubt, many cases in which a covenant not to sue may, if such be the intention of the parties, operate as a release. In *Lacy* v. *Kynaston* (*a*) it was urged that a perpetual covenant never to take advantage of a covenant, &c. is a release. The Court "agreed it, for avoiding circuity of action; as, if *A.* be bound to *B.* in a bond, &c., *B.* covenants never to sue *A.* upon this bond, this will be a bar in debt brought on the bond, because *B.* has bound himself against all the remedy that he might have upon the bond. But, if *B.* and *A.* be jointly and severally bound to *C.*, *C.* covenants never to sue *A.*, this is no defeasance, because he has a remedy against *B.*, but *A.* will have only covenant," &c.

(*a*) 1 *Ld. Raym.* 690.

We

1830.

MORLEY v. FREAR.

We must, therefore, ascertain whether it was the intention of the parties here that this deed poll should operate as the one or the other. It does operate as a release of the claim for 750*l.*, being the marriage portion of the obligee's wife; but as to the bond given in lieu, it contains merely a covenant that the obligee shall not demand payment or claim interest till after the death of the obligor; and that if the principal should be recovered by any assignee of the bond, the Plaintiff would pay the Defendant, during his life, interest on the amount recovered. The covenant, therefore, is only that the obligee will not demand payment; but by specifying what should be done in case of an assignment, the parties shew that the possibility of such an event was obviously contemplated. The intention seems to have been to place the obligee himself in the same situation, with respect to the substituted bond, as he would have been in with respect to the old one. If the Defendant had reason to think that the action was brought to enable the Plaintiff to recover for himself, and not on a *bonâ fide* assignment, he might have pleaded the fraud.

PARK J. concurred.

GASELEE J. The intention of the clause respecting an assignment, seems to have been to enable the Plaintiff, in case of need, to raise money on the credit of the bond.

BOSANQUET J. concurred in giving Judgment for the Plaintiff.

Cross requested permission to rejoin fraud, but the Court refused.

1830.

May 14. MOSER and Another, Assignees, &c. *v.* NEWMAN and BOOLE.

Under 6 *G.* 4. *c.* 16. *s.* 5. an act of bankruptcy, by lying in prison twenty-one days, does not relate to the first day of imprisonment.

THIS was an action of trover. Plea, general issue.

At the trial of the cause before *Tindal* C. J., *London* sittings after *Trinity* term last, a verdict was found for the Plaintiffs for the sum of 512*l.* 18*s.* 1*d.*, the damages agreed upon between the parties, subject to the opinion of the Court on the following case: —

The Plaintiffs were the assignees of the estate and effects of *R. H. Marshall*, bankrupt, the assignment to them having been duly executed on the 29th of *February* 1828.

The first-named defendant had been the sheriff of the county of *Devon*, and the last-named, *Thomas Boole*, was an execution creditor of the bankrupt, under whose indemnity the sheriff acted in the several matters therein stated.

On the 12th of *September* 1827 the bankrupt executed a warrant of attorney to the Defendant, *T. Boole*, for securing the payment of the sum of 500*l.*, then advanced to the bankrupt.

That warrant of attorney was duly filed, and judgment was entered up by *nil dicit* on the 16th of *January* 1828, on which day a writ of *fieri facias* was issued, directed to the sheriff of *Devon*, endorsed to levy 512*l.* 18*s.* 1*d.*, returnable on *Wednesday* the 23d of *January* then next following.

On *Friday* the 18th of *January* the writ was delivered to the sheriff, who thereupon seized the goods under the writ, which before the bankruptcy belonged to the bankrupt, and which then remained in his pos-

1830.

MOSER v. NEWMAN.

possession. The sheriff afterwards, on the 22d *January*, commenced selling the goods so seized, and continued such sale up to and on the 25th day of the same month, when the last of such goods were sold. The proceeds of the sale remained in the hands of the sheriff until the 28th day of *August* following, when they were paid over to the Defendant, *Thomas Boole*.

The bankrupt was detained in prison, in the custody of Defendant, *Newman*, as sheriff of *Devon*, for debt upon *mesne process*, on and from the 23d day of *January* 1828, for twenty-one days and upwards then next following. On the 14th day of *February* 1828 a commission of bankrupt was duly issued against the said *R. H. Marshall*; and on the 18th of *February* notice was given to the sheriff that such commission had issued against the bankrupt, and that all his goods, money, and effects, seized by the sheriff, and then in his hands, were claimed under the said commission.

The questions for the opinion of the Court were, first,

Whether, under the fifth section of 6 *G.* 4. *c.* 16., the act of bankruptcy, by lying in prison twenty-one days, had relation to the first day of such imprisonment.

Secondly, whether, supposing such relation to have existed, an action of trover was maintainable, in respect of goods seized by the sheriff under the *fieri facias*, on a day prior to the first imprisonment.

Thirdly, whether the sale, before the act of bankruptcy was complete, amounted to a conversion; and,

Fourthly, whether the Plaintiffs were entitled to recover the value of the goods so seized and sold by the sheriff.

If the Court should be of opinion that the Plaintiffs were entitled to the verdict, it was agreed upon by the parties that the same should be entered for the sum of 512*l.* 18*s.* 1*d.* and costs.

The decision of the Court turned on the first point only.

Wilde

1830.

MOSER v. NEWMAN.

Wilde Serjt. for the Plaintiffs. The act of bankruptcy has relation to the first day of the imprisonment. By 6 *G.* 4. *c.* 16. *s.* 5. it is enacted, "That if any trader, having been arrested or committed to prison for debt, or on any attachment for nonpayment of money, shall, upon such or any other arrest or commitment for debt or nonpayment of money, or upon any detention for debt, lie in prison for twenty-one days, or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention: Provided, that if any such trader shall be in prison at the time of the commencement of this act, such trader shall not be deemed to have committed an act of bankruptcy by lying in prison, until he shall have lain in prison for the period of two months."

The statutes 21 *Jac.* 1. *c.* 19. *s.* 2. and 5 *G.* 2. *c.* 30. make the nonpayment of a debt of 100*l.* within six months after the debtor shall have been arrested for the same, and the lying in prison two months upon an arrest, or escaping thence, an act of bankruptcy from the day of the arrest. The statute 1 *Jac.* 1. *c.* 15. *s.* 2. makes the lying in prison six months an act of bankruptcy, without any words giving it a relation to the first day of the arrest. No decisions have been reported on the subject of such relation, prior to 21 *Jac.* 1.; but considering the preambles in the early bankrupt acts, and the severity with which bankrupts were viewed, it is probable the same construction would have been given to the statute 1 *Jac.* 1. as to 21 *Jac.* 1., other-

otherwise opportunity would have been given to the bankrupt to make away with all his effects during his six months' imprisonment. The decisions on 21 *Jac.* 1. have been conflicting: In *Duncombe* v. *Walter* (*a*), the Court determined, with respect to a nonpayment of debt within six months after arrest, that the words of relation applied to the commencement of actual imprisonment, and that the act of bankruptcy took place only from the surrender to prison. But in *Hill* v. *Shish* (*b*) the preceding case is supposed to have been decided on the ground that the arrest was unauthorized; and it was holden upon a similar case that the act of bankruptcy dated from the arrest. *Holt* C. J. also, in *Smith* v. *Stracy* (*c*), held the words of relation to apply to the first arrest. However, though the decisions on that point have varied, it will be expedient to construe an act of bankruptcy, constituted by lying in prison twenty-one days, as taking place from the first day of the imprisonment, lest the bankrupt should make away with his effects during the twenty-one days. By section 135. the act is, in cases of doubt, to be construed beneficially to creditors. In *Higgins* v. *M'Adam* (*d*) the point has been decided against the relation to the first day of the imprisonment; but the intention of the legislature may still admit of doubt.

TINDAL C. J. I am of opinion that the act of bankruptcy is not complete till the twenty-one days have elapsed, and I should be of that opinion even if the matter were *res integra*. The act says, "That if any such trader, having been arrested or committed to prison for debt, or on any attachment for nonpayment of money, shall, upon such or on any other arrest or commitment

(*a*) 2 *Show.* 253.
(*b*) 2 *Show.* 524.
(*c*) 1 *Salk.* 110.
(*d*) 3 *Young & Jar.* 1.

for

1830.

MOSER v. NEWMAN.

for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days, or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy."

The word *thereby* is a comprehensive word, and means by the twenty-one days during which he has been in prison. And the next clause shews the distinction, "Or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention."

The meaning of which clearly is, that in the one case the act of bankruptcy shall be reckoned from the end of the twenty-one days, in the other, from the first arrest. And the distinction may be said to appear historically; for the clause of relation is omitted in the first statute, 1 *Jac.* 1. *c.* 15., inserted in the next, 21 *Jac.* 1. *c.* 19., and continued ever since till the passing of the 5 *G.* 4., and 6 *G.* 4. *c.* 16., when it appears to have been omitted by design, the period of confinement constituting an act of bankruptcy having been materially abridged. The case of *Hill* v. *Shish* is open to much doubt, having been decided, according to the report, without due consideration: *Smith* v. *Stracy* contains only an opinion thrown out at *Nisi Prius*. Besides, looking at the statute of 21 *James* 1., a distinction may be drawn between an act of bankruptcy, by not paying a debt within six months after an arrest, and an act, by lying in prison two months, or escaping from prison after the arrest. For it is only in the case of lying in prison for the two months, or escaping, that the relation to the time of the arrest is, by the express language of the statute, to take place.

PARK

1830.

MOSER v. NEWMAN.

PARK J. I am of the same opinion, and think the question is historically clear; for when we observe the legislature sometimes inserting and sometimes omitting the clause of relation, we must presume their attention has been drawn to the point, and that the last omission, at least, is designed, especially when we see the preceding act, 5 *G.* 4. *c.* 98. *s.* 4., leaves out the clause of relation in every case. The case of *Higgins* v. *M'Adam*, which appears to have been well considered, leaves no doubt on the point.

BOSANQUET J. I am of the same opinion. The courts are cautious in giving to any act a retrospective effect by relation; and seeing that this clause has been omitted after previous insertions, we must consider the omission designed, especially when a shorter period of imprisonment is constituted an act of bankruptcy.

GASELEE J. was at chambers, but concurred in the decision of the Court.

Judgment of nonsuit.

DOE dem. Lord TEYNHAM *v.* TYLER.

May 21.

THE question raised in this ejectment was, whether *Henry*, the twelfth Lord *Teynham*, was of sound mind when he suffered a recovery in 1789. There was conflicting evidence on the point; but, in the opinion of the Court and jury, the evidence in favour of his lord-

The Court will not grant a new trial on the ground that evidence has been admitted which ought to have been rejected, if, exclusive of such evidence, there be enough to warrant the finding of the jury.

1830.

DOE dem. Lord TEYNHAM v. TYLER.

ship's being of sound mind preponderated, and on that ground a verdict was found for the Defendant.

A great number of witnesses spoke to his lordship's competency to transact all ordinary business; and, among other evidence to this effect, the accounts of a deceased steward were put in, which it was assumed his lordship had examined and settled.

These accounts were handed to the jury, and commented on by the counsel for the Defendant as being important to his case.

The accounts, however, purporting to discharge the steward as well as to charge him,

Jones Serjt. obtained a rule *nisi* for a new trial, on the ground, among other objections (see ante, 390.), that those accounts had been improperly received in evidence, inasmuch as on the whole they tended to discharge the steward; and the only ground on which such documents could be received in evidence, was, as charging the deceased person, and so being against his interest. *Warren* v. *Greenville* (*a*), *Goodtitle* v. *Chandos* (*b*), *Higham* v. *Ridgway* (*c*), *Outram* v. *Morewood* (*d*), *Roe dem. Brune* v. *Rawlings* (*e*), *Calvert* v. *Archbishop of Canterbury* (*g*), *Barry* v. *Bebbington* (*h*).

The Court, upon hearing the report of the trial read, stopped *Wilde* Serjt., who was to have shewn cause, and called on

Jones, to shew that there was not enough to sustain the verdict, independently of the evidence objected to.

He contended, that it was impossible for the Court to discriminate between the effects produced by each parcel

(*a*) 2 *Str.* 1129.
(*b*) 2 *Burr.* 1065.
(*c*) 10 *East*, 109.
(*d*) 5 *T. R.* 121.
(*e*) 7 *East*, 279.
(*g*) 2 *Esp.* 646.
(*h*) 4 *T. R.* 514.

of

1830.

DOE dem. Lord TEYNHAM v. TYLER.

of evidence on the mind of the jury, or to determine that the verdict was not altogether occasioned by the very lot of evidence now objected to; and that a new trial ought to be granted, if that evidence were clearly inadmissible.

TINDAL C. J. This rule must be discharged. I will assume for the purpose of this discussion, though I give no opinion on the point, as we have not heard the other side, that the evidence in question ought not to have been received. But the Court will not close their eyes to the rest of the evidence; and if they see that there is enough, not merely to make the scales hang even, but greatly to preponderate in favour of the Defendant, they will not send the cause to a jury again. It has been contended, that we are to analyse the evidence by a difficult process, and to discriminate the precise effect produced on the mind of the jury on each portion of the proof: but we have a much plainer course; and that is, to hear the report of the trial, and to sustain the verdict, if we are satisfied that there is enough to warrant the finding of the jury independently of the evidence objected to. On this principle, the decisions in *Horford* v. *Wilson* (*a*) and *Nathan* v. *Buckley* (*b*) are quite in point; and we cannot send the cause to a new trial when the jury are right upon that portion of the evidence which is unimpeached.

PARK J. I am of the same opinion. I will assume, for the purpose of this argument, that the evidence in question ought not to have been admitted; but when we look at the rest of the evidence in the cause, its reception does not offer the slightest ground of objection to the verdict. It has been repeatedly ruled, that though par-

(*a*) 1 *Taunt.* 12. (*b*) 2 *B. Moore*, 153.

1830.

DOE dem. Lord TEYNHAM v. TYLER.

ticular portions of evidence are objected to, if the rest be sufficient to warrant the conclusion to which the jury have come, the Court will not interpose. In *Horford* v. *Wilson*, *Mansfield* C. J. said, "The Court will not set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury;" and the counsel for the Defendant never objected. The same rule was acted on in the King's Bench, in *Edwards* v. *Evans* (*a*): and then, in *Nathan* v. *Buckley*. This is no new point, and we are not exceeding the line of our duty in determining whether or not the verdict is warranted by that portion of the evidence which is not objected to.

GASELEE J. The evidence objected to was intended to shew only one of various acts, which all tended to shew that the party, whose competency was in question, possessed sufficient faculties to transact the ordinary business of life. Its reception, therefore, could not have had any material influence on the jury; and, as the lessor of the Plaintiff is not precluded from commencing another ejectment, I concur in thinking that this rule ought to be discharged.

BOSANQUET J. The granting a new trial is a matter of discretion in the Court; a discretion indeed, not to be exercised capriciously, but according to the rules and practice of the Court: and I think we may, according to those rules, refuse a new trial in this case; there being evidence amply sufficient to support the verdict, exclusively of the evidence objected to.

Rule discharged.

(*a*) 3 *East*, 451.

1830.

NEWELL *v.* SIMPKIN and Others.

May 21.

THIS was an action against the churchwardens of a parish, to try the validity of a rate.

In a suit touching the validity of a parish rate, the Plaintiff is entitled to inspect the parish books without paying any costs.

Wilde Serjt. having obtained a rule *nisi* for the Defendants to permit the Plaintiff to inspect and copy the parish books,

Merewether Serjt., on the part of the Defendants, offered to comply, if the Plaintiff would pay the costs of the person attending to exhibit the books in question; but

Wilde insisted on the inspection as a matter of right.

The Court desired that a similar rule in the Court of King's Bench in the *St. Martin's in the Fields* case should be inspected, for the purpose of ascertaining whether costs had been allowed. It appearing they had not, the present rule was made absolute, without any order as to costs.

1830.

May 21. BEAVAN *v.* DAWSON, Sheriff of BEDFORD.

The sheriff, without previously requiring an indemnity, seized, under an execution issued by *A.* against *L.*, goods which were in the possession of Plaintiff under a bill of sale from *L.*, notwithstanding notice of the bill of sale. He then applied to *A.* and Plaintiff severally for an indemnity before proceeding further, but both refused, and the Plaintiff sued him in trespass for the seizure.

The Court staid the proceedings till an indemnity should have been given.

COLONEL *Lautour*, upon adequate consideration of money advanced, made to the Plaintiff in *November*, 1829, a bill of sale of his goods, with a condition that the sale should not take place later than the 1st of *February*.

The Plaintiff immediately took and kept the goods, and on the 1st of *February*, at *Lautour*'s request, and in expectation of payment, further postponed the time of sale till the 1st of *March*.

On the 22d of *April*, the goods, still in the possession of the Plaintiff's bailiff, were, notwithstanding notice of the bill of sale, seized by the Defendant as sheriff of *Bedford*, under a *fi. fa.* issued by Messrs. *Antrobus*, who had obtained a judgment against *Lautour*. *Antrobus*'s attorney wrote to the under-sheriff, and, apprizing him of the bill of sale which *Latour* had made to the Plaintiff, instructed him, nevertheless, to make a seizure of the goods, in order to obtain a priority and prevent a sale by the Plaintiff; but not to sell immediately, as the attorney was desirous not to depreciate the property, by pressing it precipitately into the market.

The sheriff, after he had made the seizure, applied to *Antrobus*'s attorney for an indemnity before proceeding further; but the indemnity being refused, he offered, if the Plaintiff *Beavan* would indemnify him, to return *nulla bona*, and relinquish the possession of the goods.

The Plaintiff, however, refused, and commenced this action of trespass against the sheriff; whereupon,

Wilde

1830.

BEAVAN v. DAWSON.

Wilde Serjt., on the authority of *Butts* v. *Smith*, referred to in *Probinia* v. *Roberts* (*a*), obtained a rule *nisi* to stay proceedings till the sheriff should have been indemnified.

Taddy Serjt. shewed cause. The Court will not extend to the sheriff the indulgence required, under circumstances such as the present. In cases where the sheriff is placed under difficulties by operation of law, as where property passes by relation, he is entitled to and receives relief. Upon an extent at the suit of the Crown or an execution against one who has committed an act of bankruptcy, it is often impossible for the sheriff to ascertain in whom the property is vested: but here the Plaintiff was fairly in possession; and the sheriff, knowing that, lends himself to the plans of the execution creditor to prevent a sale by the Plaintiff, without requiring an indemnity till he has actually made a seizure. He has no right to call on the Plaintiff for an indemnity, after proceeding to act for the execution creditor without requiring one. *Probinia* v. *Roberts*, *Butts* v. *Smith*, and *King* v. *Bridges* (*b*), are all cases of bankruptcy, in which the sheriff was placed in difficulties by the doctrine of relation. And in *Probinia* v. *Roberts* he had actually seized and was entitled to poundage before his possession was disputed. No case has gone so far as the present; and the application is not made upon payment of costs, which was enjoined in *Probinia* v. *Roberts*.

TINDAL C. J. This case falls within the general principle, that the sheriff is not, at his own expense, to fight the cause of the contending parties. The proceedings must be staid till an indemnity has been given, and without payment of the Plaintiff's costs, because the Plaintiff has refused to indemnify when requested.

Rule absolute.

(*a*) 1 *Chit.* 577. (*b*) 7 *Taunt.* 294.

1830.

May 21.

NELSON *v.* WILSON.

Where the parties settle a cause without the intervention of the Plaintiff's attorney, he cannot proceed to trial for his costs, unless he can clearly establish collusion between the parties to deprive him of his costs.

IN this case the Plaintiff, without communication with his attorney, received from the Defendant, before the time for trial, a sum of money in satisfaction of the debt and costs sought to be recovered. Whereupon the Plaintiff's attorney carried the record to the assizes, and took a verdict with 1*s.* damages, in order to issue thereon an execution for his costs.

Previously to the assizes, the Defendant's attorney informed the Plaintiff's attorney that the cause had been settled, and that if he proceeded to the assizes an application would be made to this Court to set aside the verdict.

It appeared in evidence at the assizes, and afterwards on affidavit, that there was ground for believing that the Plaintiff and Defendant had colluded together to deprive the Plaintiff's attorney of his costs.

Wilde Serjt., within the first four days of term, obtained a rule *nisi* to set aside the verdict, and for the Plaintiff's attorney to pay the costs of the application, on the ground that he ought not to have proceeded to trial after the cause had been settled.

E. Lawes Serjt. shewed cause, and contended, that the attorney was entitled to proceed for his costs, where there was, as here, a strong suspicion of collusion between the parties.

In reply, it was insisted that the attorney was not entitled to proceed, unless he could shew a clear case of collusion.

The

1830.

NELSON v. WILSON.

The Court having taken time to look into the affidavits,

TINDAL C. J. now said, It is undoubtedly competent for the party to settle the cause without the intervention of his attorney; and if the attorney proceeds in order to secure his costs, he is bound to make out a clear case of collusion between the Plaintiff and Defendant to deprive him of such costs. Upon reading the affidavits in this case, we think that, though there is ground for suspicion, the collusion has not been clearly made out, and that the proceedings must be staid; but, under the circumstances, without costs.

Rule absolute.

HUMPHREYS *v.* KNIGHT.

May 13.

Where the Defendant obtained his certificate as a bankrupt after issue, and before judgment, the Court refused, after judgment, to enter an *exoneretur* on the bail-piece.

THE Defendant, a bankrupt, being sued on a debt contracted before his commission was issued, obtained his certificate under the commission after issue, and before trial: he did not plead his certificate *puis darrein continuance*, but the Plaintiff's attorney had notice of the certificate before trial, and said he supposed proceedings were at an end. Having proceeded, however, to trial, and judgment,

Adams Serjt., on behalf of the bail, who were in a condition to render the Defendant if they thought fit, obtained a rule *nisi* to enter an *exoneretur* on the bail-piece, under the provisions of the 6 *G.* 4. *c.* 16. *s.* 121., by which it is enacted, "That every bankrupt who shall have duly surrendered, and in all things conformed

1830.

HUMPHREYS v. KNIGHT.

formed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter directed." And by *s.* 126., "That any bankrupt, who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand hereby made proveable under the commission against such bankrupt, shall be discharged upon common bail, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate; and if any such bankrupt shall be taken in execution, or detained in prison for such debt, claim, or demand, where judgment has been obtained before the allowance of his certificate, it shall be lawful for any Judge of the Court wherein judgment has been so obtained, on such bankrupt's producing his certificate, to order any officer, who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt without exacting any fee, and such officer shall be hereby indemnified for so doing."

Wilde Serjt. shewed cause. The 126th section only entitles the bankrupt to his discharge where he is arrested, after obtaining his certificate, on a debt due before the bankruptcy, and where he is taken, after certificate, under a judgment obtained before. The Defendant is in neither of these predicaments, and ought at least

least to plead his certificate. In *Clarke* v. *Hoppe* (*a*) it was held, that if an action be commenced, and the defendant become bankrupt and obtain his certificate, and afterwards permit judgment to be signed for want of a plea, after which the plaintiffs proceed against the bail, the Court will not relieve the bail on motion.

Adams. The practice has always been, to enter an *exoneretur* in these cases; *Joseph* v. *Orme.* (*b*) And *Clarke* v. *Hoppe* was anterior to the 49 *G.* 3. *c.* 121. In *Woolcot* v. *Leicester* (*c*) there was a surmise, that the certificate had been unfairly obtained: but in *Harmer* v. *Hagger* (*d*) the Court relieved the bail on motion, and refused to question the validity of the commission. Here, under the 121st section of the 6 *G.* 4. *c.* 16., the Defendant is entitled to his discharge from the debt sought to be recovered in this cause. But if the bail remain liable, the Defendant is liable; which is contrary to the intention of the legislature.

TINDAL C. J. The bail no doubt stand in the same situation as the bankrupt; and if they had been damnified by any thing that has taken place, so as to have been prevented from rendering their principal, we must have considered the question which has been raised on this rule. But here they are in a condition to render; and no question has been brought before us but the very important one, Whether the bankrupt is entitled to be discharged under the 126th and 121st sections of the statute.

If it be intended to obtain a decision on that question, we think the bankrupt should make the application for himself, and that this rule should be

Discharged.

(*a*) 3 *Taunt.* 46.
(*b*) 2 *N. R.* 180.
(*c*) 6 *Taunt.* 75.
(*d*) 1 *B. A.* 332.

1830.

May 21.

Same Case.

A bankrupt, who obtained his certificate after issue, and before judgment, having, after judgment, been rendered in discharge of his bail, was held entitled to be liberated on a summary application, although he had not pleaded his certificate *puis darrein continuance*.

THE Defendant having now been rendered to prison in discharge of his bail,

Adams Serjt. obtained a rule *nisi* for his discharge, pursuant to 6 *G.* 4. *c.* 16. *ss.* 121. and 126.

Wilde Serjt., who showed cause, contended that the defendant ought to have pleaded his certificate *puis darrein continuance*, and could not be discharged on a summary application. His remedy was by *auditâ querelâ*.

The act having specified a case in which the bankrupt is to be discharged summarily, it may be inferred that in cases not specified he must be put to his plea. Section 126. gives the discharge on summary application, where the judgment has been obtained *before* the allowance of the certificate. Here it was not obtained till after; and the 121st section only discharges the bankrupt, subject to the provisions of section 126.

Adams. Although the certificate be obtained before judgment, the bankrupt is entitled to his summary discharge as much as if it had been obtained after; *Boutefloar* v. *Coats* (*a*); otherwise he might remain in prison for ever, if he neglects to plead *puis darrein continuance*. The object of the 126th section is to free the bankrupt from arrest and detentions of all kind after he has obtained his certificate; and from the Court's having required, in *Clark* v. *Hoppe*, a surrender before the bankrupt's application for his discharge, it must be in-

(*a*) *Cowp.* 25.

ferred

ferred that the application after surrender is almost of course. In *Todd* v. *Maxfield* (*a*), where a defendant obtained a certificate under a commission of bankruptcy before trial, and did not plead it *puis darrein continuance*, the Court relieved the bail on motion.

TINDAL C. J. The Court will decide on the principle to be drawn from *s.* 121. The preceding part of the statute having taken from the bankrupt all his property, the 121st section enacts, "That every bankrupt, who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter directed; but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound or had made any joint contract with such bankrupt."

The provision of this section acts as a complete discharge from the time the certificate is granted. Here he had no doubt an opportunity of pleading his certificate *puis darrein continuance*; but as he might have obtained relief on *audita querela*, the Court may interpose summarily.

Rule absolute.

(*a*) 3 *B.* & *C.* 222.

1830.

May 21.

ROE dem. DURANT *v.* DOE.

1. Where the lessor of the Plaintiff, upon affidavit that a tenancy under a written instrument has been duly determined, moves that the Defendant may give security for costs, a subsequent retaking, if an answer to the motion, must be alleged with particularity and precision.

2. A notice on the 28th of *September*, to quit on the ensuing 25th of *March*, is a sufficient half-year's notice to quit.

UPON affidavits which stated that the premises sought to be recovered in this ejectment had, in 1824, been demised by a written agreement to *Thomas Moore*, the tenant in possession; that the agreement had been duly executed, and was produced to the Court; that *Moore*'s interest had been duly determined by a regular notice to quit; that demand of possession had been made; and that *Moore* had been served with a declaration in ejectment on the 24th of *April*, 1830,

A rule *nisi* was obtained under 1 *G.* 4. *c.* 87., calling on *Moore*, upon being admitted Defendant, besides entering into the common rule and giving the common undertaking, to undertake, in case a verdict should pass for the Plaintiff, to give the Plaintiff a judgment to be entered up against the real Defendant of the term next preceding the time of trial; and also to enter into a recognizance by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages which should be recovered by the Plaintiff in the action.

Cross Serjt. shewed cause, on an affidavit by *Moore* that he had held the premises for several years; that on the 28th of *September*, 1828, he received notice to quit on the 25th of *March*, 1829; that long after the service of the notice to quit, he saw the steward of the lessor of the Plaintiff, and retook the premises by parol; that he had rented and held them under such parol agreement from the 25th of *March*, 1829, till the present time; that he

was

1830.

ROE dem. DURANT v. DOE.

was advised that there was a valid tenancy now existing, and that he had a good defence to the action.

It was contended, that the notice to quit was insufficient, for want of a full half year between the 28th day of *September* and the 25th of *March* following; [*Tindal* C. J., a customary half year is sufficient;] and that, at all events, the case was taken out of the statute by the subsequent parol agreement.

Wilde Serjt., who supported the rule, urged, that to take the case out of the statute, a new demise ought to have been shewn with precision. If there had been a new demise, the defendant would have had a good defence on the merits, to which he had not deposed.

TINDAL C. J. What the decision of the Court might have been, if the affidavit of the tenant had been more precise, I do not say; but, as he merely deposes that he retook the premises, without saying for what period, whether for a month or for a year, or on what other terms, I think, in the absence of satisfactory evidence of a new taking, that the case is within the act, and the rule must be made

Absolute.

1830.

May 18. KAY, Assignee of SHERWIN, *v.* GOODWIN.

The proceedings under a commission of bankruptcy sued out in 1822, were not enrolled till after the repeal of the 5 *G.* 2. *c.* 30. in 1825: Held, that they were not admissible in evidence, the 6 *G.* 4. *c.* 16. not applying to the enrolment of proceedings under commissions anterior to the act.

SHERWIN became bankrupt, and a commission was issued against him in 1822, when a deposition of one *Button*, proving an act of bankruptcy, was made before the commissioners.

Button died about three weeks afterwards.

Subsequently to the passing of the 6 *G.* 4. *c.* 16., and the repeal of 5 *G.* 2. *c.* 30., *Button*'s deposition was enrolled in the way prescribed by the 5 *G.* 2. *c.* 30., and in the way prescribed by 6 *G.* 4. *c.* 16.

Being offered in evidence, in support of the Plaintiff's case, on the trial of the above cause, it was objected that it had never been duly enrolled, and ought not to be received.

The 5 *G.* 2. *c.* 30. having been repealed at the time the document was carried in, there could be no enrolment under that statute; and the 6 *G.* 4. *c.* 16. *s.* 95., applied only to proceedings subsequent to the passing of the act.

A verdict having been found for the Defendant,

Taddy Serjt. obtained a rule *nisi* for a new trial, on the ground that the deposition ought to have been admitted in evidence, either under the ninety-fifth or ninety-second sections of 6 *G.* 4. *c.* 16.

Adams Serjt. shewed cause. By the ninety-fifth section of 6 *G.* 4., it is enacted, "That all things *done pursuant to the act* passed in the fifth year of king *George* II., and hereby repealed, whereby it was enacted that the Lord Chancellor should appoint a place where all

all matters relating to commissions of bankruptcy should be entered of record, and should appoint a person to have the custody thereof, be hereby confirmed: and the Lord Chancellor shall be at liberty, from time to time, by writing under his hand, to appoint a proper person who shall, by himself or his deputy, (to be approved by the said Lord Chancellor,) enter of record all matters relating to commissions, and have the custody of the entries thereof:"

And by *s.* 96., "That, in all commissions issued *after the act shall have taken effect*, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received in evidence in any court of law or equity, unless the same shall have been first so entered of record as aforesaid."

The enrolment of *Button*'s deposition not having taken place till after the repeal of 5 *G.* 2. *c.* 30., it cannot be confirmed, under *s.* 95. above, as a thing done pursuant to that act; and the enrolment, under *s.* 96., is of no avail, *Sherwin*'s commission having issued long before the 6 *G.* 4. took effect, while the clause is confined in its operation to commissions issued after.

By *s.* 92. of that statute, it is enacted, "That, if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission), within two calendar months after the adjudication, or (if he was out of the United Kingdom,) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of, or previous to, the adjudication of the petitioning creditors' debt or debts, of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained in all actions at law, or suits in equity, brought by the

1830.

KAY v. GOODWIN.

assignees for any debt or demand for which the bankrupt might have sustained any action or suit."

But the Court will not give a retrospective operation to this section. Under the 5 *G.* 2. *c.* 30., the proceedings of bankruptcy were recorded, like depositions taken before magistrates, merely for the purpose of preserving testimony; and when produced they were open to the same observations as any other evidence; but, under the new statute, the proceedings are made conclusive, and the effect of holding the clause retrospective will be to set up all invalid commissions of bankrupt issued previously to the act. This would operate with great hardship, both on the bankrupts under such commissions, and their debtors; on the bankrupt, by precluding him from contesting the commission, however vicious; on his debtors, by rendering them liable to repay to assignees what they may have paid to the bankrupt, when, if the commission be invalid, their payments ought to be protected. The Court will not occasion such inconvenience without the sanction of language expressly making the clause retrospective. But the language of the ninety-second clause, when that of the ninetieth and ninety-sixth sections is considered, is rather prospective than retrospective. *Key* v. *Cook* (*a*) is an express decision on the point, and was well considered, because the Chief Justice had been at first of a different opinion.

Taddy and *Andrews*, Serjts. in support of the rule. As the proceedings could not be enrolled under the ninety-sixth section at least they ought to stand under the ninety-fifth, otherwise the parties are under the hardship of being excluded altogether, which never could have been the intention of the legislature; but at all events the plaintiffs were entitled to give the depositions

(*a*) 2 *M.* & *P.* 720.

in

1830.

KAY v. GOODWIN.

in evidence under the provisions of the ninety-second section; and there is a fallacy in the word *retrospective*; for the question is not whether that clause is to have a retrospective operation, but rather, whether it applies to all commissions or to a particular class only. The true construction of the act is, that where the word *commission* is used generally, without any limitation, it includes commissions in existence at the time the act passed; where the legislature intended to confine it to commissions issued subsequently to the act, that intention is clothed in express words, as in section ninety-six. And this has been the principle of all the decisions with the exception of *Key* v. *Cook*. In *Bell* v. *Bilton* (*a*) it was held, that before suing the surety of the grantor of an annuity in respect of arrears of the annuity, where the grantor has become bankrupt, the value of the annuity must be ascertained by the commissioners, although the annuity was granted, and the grantor became bankrupt previously to *September* 1825. In *Exparte Grundy* (*b*), it was held that the 56th section of the act was retrospective in its operation; and that, although the event upon which a debt was contingent had happened after a commission had issued, and before the 6 *G.* 4. *c.* 16. came into operation, the sum of 2000*l.* was proveable as a debt under that commission: and the Lord Chancellor said, "such is the construction which I should be disposed to put upon the fifty-sixth section, if it stood alone; but great light is thrown upon the intention of the legislature by reference to other clauses of the act. In that immediately following, the fifty-seventh, which enables the holder of any bill of exchange or promissory note to prove for interest where interest is not reserved by the instrument, and it is overdue at the issuing of the commission, the words are, 'That in all

(*a*) 4 *Bingh.* 615. (*b*) *Montag. & M'Carth.* 313. 311.

1830.

KAY v. GOODWIN.

future commissions against any person or persons liable upon any bill of exchange or promissory note whereupon interest is not reserved, overdue at the issuing the commission, the holder of such bill of exchange or promissory note shall be entitled to prove for interest upon the same, to be calculated by the commissioners to the date of the commission, at such rate as is allowed by the Court of King's Bench, in actions upon such bills or notes.' It is an argument fairly deducible from this section, that where the legislature intended to confine the act to future commissions, the intention is expressed in direct terms. The same observation is applicable to the ninety-sixth and ninety-eighth clauses, the first of which commences with the words: 'That in all commissions issued *after* this act shall have taken effect,' &c.; and the second with the words: 'That *after* this act shall have come into effect,' &c. Under these circumstances, independently of what I consider to be the obvious and legitimate interpretation of the fifty-sixth section, considered by itself, I think the construction I have stated, is confirmed by adverting to the language used by the legislature in other clauses, where the operation of the enactment was intended to be confined to the future. But, the 135th section has been cited as being at variance with this construction of the fifty-sixth section. The words relied upon were: 'That nothing herein contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared;' and the words which follow, 'That nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or *affect* or *lessen* any *right*, claim, demand, or *remedy* which any person now has thereunder or upon or against any bankrupt, against whom any commission has or shall have issued, except

except as is herein specifically enacted;' and it was contended that the meaning of these words are, that the statute shall not be applied to commissions which existed previously to its coming into operation, except where it is expressly declared that the act shall apply. But this argument is inconsistent with the mode adopted to confine the operation of the statute in the fifty-seventh, ninety-sixth and ninety-eighth sections, and would, in my opinion, extend the effect of the clause beyond the natural and obvious import of the words used. It remains to be observed, that the case is not devoid of authority. A question analogous to the present, and which depended upon the construction of the clause immediately preceding the fifty-sixth section, was determined by the Court of Common Pleas in *Bell* v. *Bilton*. (*a*) The judges were in that case of opinion, that where the legislature intended to confine the operation of the act to future commissions, that intention has been expressed. So far, therefore, as there is any analogy between the fifty-fifth and fifty-sixth sections, I consider the decision in *Bell* v. *Bilton* to be in point. There have also been decisions in this Court, which appear to have been grounded upon a similar construction of the statute. As to the consequences of the construction to which I have adverted, it was contended at the bar that it may be productive of hardship in particular cases. It is certainly possible that it may; but in other cases, as in that before the Court, it will operate beneficially; and in the majority of instances that can be stated, I think it will prove advantageous to creditors, and give full effect to the remedy intended by the legislature."

In *Cuming* v. *Welsford* (*b*), an execution on a final

(*a*) 4 *Bingh.* 615. (*b*) *Ante*, 502.

 judgment

1830.
KAY
v.
GOODWIN.

judgment by *nil dicit*, was held to be within the proviso of *s.* 108. 6 *G.* 4. *c.* 16., although there was no concert between the parties, and the judgment was obtained before the act came into operation.

The object of the act was to produce peace between bankrupts and their creditors; it is to be construed beneficially to creditors (*s.* 135.); and though some hardship may ensue in giving the ninety-second section the construction now contended for, the beneficial effects will greatly preponderate: nor would the hardship in any case be great, because the documents are only to be conclusive as to the matters *therein contained*, leaving it open to the bankrupt to dispute any other matters. And the language of the ninety-second section plainly has reference to commissions in existence at the time of passing the act, being in the past tense, 'if the bankrupt shall not *have* given notice.' *Key* v. *Cook*, is a decision of two judges only, Chief Justice *Best*, and *Burrough* J.; and the Chief Justice having before expressed a different opinion, the case cannot be considered as conclusive.

TINDAL C. J. It appears to me, on the best consideration which I can give this case, that the evidence which was offered at the trial was properly rejected. The first question is, whether it could be received under 5 *G.* 2. *c.* 30. *s.* 41. In order to be competent evidence under that statute, it must be a deposition that was duly enrolled; and, therefore, the first question is, whether there is any power, as the law now stands, of enrolling a deposition under a commission issued before the late act. Now, it is perfectly clear, that the 5 *G.* 2. was repealed by the statute of the 6 *G.* 4. *c.* 16. I take the effect of repealing a statute to be, to obliterate it as completely from the records of the parliament as if

it

1830.
KAY
v.
GOODWIN.

it had never passed; and, it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law. It follows, therefore, that this statute having been repealed by the 6 *G.* 4., the power of enrolling under the 5 *G.* 2. has perished with that act. Then, is there any thing in the 6 *G.* 4. which gives a power of enrolment in a case like the present? The section which has been relied upon is the ninety-fifth, but I think that section will not bear the construction of a retrospective effect to depositions that ought to have been enrolled under the previous act. That clause says, that all things done pursuant to the act passed in the fifth year of the reign of King *George* II. and hereby repealed, whereby it was enacted that the Lord Chancellor should appoint a place where all matters should be entered of record, &c. shall be thereby confirmed. This is not a thing done under that statute; the depositions had never been recorded or carried to the officer who was appointed under that statute, and the ninety-sixth section, which is in continuation of the ninety-fifth, gives a sense to it by shewing that the ninety-sixth section at least only refers to commissions issued after the act had taken effect. If then, this is not a deposition receiving its validity as evidence by virtue of any enrolment upon record, could it be admitted in evidence simply as a deposition by virtue of the ninety-second section of 6 *G.* 4. That brings us to the more important question, whether that ninety-second section has a retrospective effect; or, more properly, whether it has any operation on commissions that were issued before the act passed: and I think the sound construction of the section, taking at the same time into consideration the ninety-third section which follows it, and also the 135th, is to hold that it would not have such operation.

1830.

KAY v. GOODWIN.

It appears to me, that if the ninety-second section is considered as affecting commissions which were then in a course of operation, it would materially alter the situation both of the bankrupts and of the parties claiming a remedy under the commission. It would alter the situation of the bankrupt, because it would enable his assignees, and would enable other persons to conclude him as a bankrupt without the possibility of his contesting his bankruptcy within that period of time which the statute meant to allow him. It is only to suppose that he had been adjudicated a bankrupt more than two months before this act passed; or, that being absent from *England*, he had been absent a whole twelvemonth, and he is at once effectually concluded to all intents and purposes, from all benefit of contesting the commission issued against him. It would also materially affect the interests of other persons, because, whenever this conclusion of evidence is to take effect, the ninety-third section has provided that parties who were called upon to pay their debts should have a power by the space of two months, to pay their money into court during which time this question of bankruptcy might be tried; that power would also be entirely taken away from them, and this construction would entirely deprive them of the benefit of that clause.

It seems, therefore, to me, that the 135th section, which states that the construction of this act shall be such as not to affect or lessen any right, claim, demand, or remedy, which any person now has thereunder, or upon, or against any bankrupt, against whom any commission shall have issued, (and so on,) would not be observed if we were to put a different construction upon the act from that which I have stated.

It has been said, that there are several cases in which the construction of this act of parliament has been, that it should apply to commissions which had been issued and were then in the course of operation. That may be

1830.
KAY v. GOODWIN.

be the case when the law has been altered in general terms, or old provisions are re-enacted. Such a general alteration of the law will apply as part of the law of bankruptcy to commissions issued before the new law; but when new provisions are introduced which apply to particular cases, and give entirely new remedies, we must look to the very words of the sections, in order to see whether they apply or not to by-gone and then existing commissions.

It seems to me, applying that rule to the ninety-second section, that it was not the intention of the legislature that it should affect commissions then in existence.

As to any hardship that may be wrought upon the assignees of bankrupts, or upon other parties who seek their remedy under the commission, it can only be said, that the law which required enrolment under the 5 *G.* 2. continued up to the time of passing this act, which repealed it; and, that if they did not think proper to have recourse to it to preserve these muniments which they say are material to ascertain the rights of the bankrupts against other claimants, I can only apply to them the old maxim, *Vigilantibus non dormientibus, jura subveniunt.* It seems to me, it is their own fault that any omission has affected them.

PARK J. I am quite satisfied from the luminous exposition which my lord has just made to the Court, that the construction which has been put upon the act now, and was put upon it in *Key* v. *Cook*, is the true construction.

GASELEE J. I think there is a great deal of difficulty in this question, but considering as I do that the ninety-second and ninety-third clauses are meant to go together, and that a construction being put upon the ninety-second section different from that which the Court has now put

on

1830.
KAY
v.
GOODWIN.

on it, would, in its consequences, annihilate the ninety-third section as to all cases arising before the passing of this act of parliament, I am inclined to think that the construction now put upon the ninety-second section, is the right one.

BOSANQUET J. I am of the same opinion. The act of Parliament having in some sections stated what commissions that act intended to apply to, and in others used general terms, the Court ought to be very certain that the ninety-second section, which is the one now under consideration, does apply to antecedent commissions. But, after giving the best attention to the construction of that section that I am able, it does appear to me that it is impossible in this case to apply it to commissions that were issued before this act came into effect. This section, if it is to operate at all, makes the deposition when it is received, conclusive; and it seems to me that it is quite impossible to say that the section shall operate so as to make the deposition conclusive in a case such as the present, when we look to the former part of the section, which says that it shall operate, unless the bankrupt, if he shall be within the United Kingdom, within two calendar months after the adjudication, or, if out of the United Kingdom, within twelve months after the adjudication, has given notice of his intention to dispute the commission.

Now, time was certainly given in this act in some cases, to enable a person becoming bankrupt antecedently to the act, to avail himself of the clause before the act came into effect. The act passed the 2d *May*, and time is given until the 1st day of *September*, but that time does not extend to twelve calendar months; and we must apply the same construction to this section, whether the party was within the United Kingdom, or was without the United Kingdom.

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1830.

KAY v. GOODWIN.

It seems to me therefore, that it is impossible, consistently with justice, to apply this ninety-second section to the commission which is the subject of our present consideration. It is to be observed, that if the party had been disposed to avail himself of an enrolment under the former act, he had the opportunity of doing so between the time when the new act passed and the time when it came into effect, for time was given from the 2d of *May* till the first of *September*, and having suffered that time to go by, I think he cannot now avail himself of this section which would operate unjustly, if it were allowed to take effect in this case.

Rule discharged.

CLARKSON *v.* LAWSON.

May 19.

LIBEL. See the declaration, *ante*, 266.

Declaration, that Defendant had libelled Plaintiff, a proctor, by publishing that he had been suspended three times.

Plea, as to one of the said suspensions, that Plaintiff had been once suspended by Sir *J. N.*:

Held, that the libellous matter was thus divisible, and the plea an answer as to part.

After the decision upon one of the Defendant's pleas, as there reported, the Plaintiff, who had replied *de injuriâ* to another plea, obtained leave to withdraw his replication for the purpose of demurring, upon allowing the Defendant to plead *de novo*. The Defendant accordingly, now put in, first, a plea to the whole declaration, on which the Plaintiff joined issue; and, secondly, the following plea: —

And for a further plea in that behalf, the Defendant saith, that as to the publishing, and causing and procuring to be published so much of the said supposed libellous matter as imputes or charges to or against the Plaintiff, that he, before the said several times when, &c. had been once suspended in his aforesaid profession and business of a proctor, above supposed to have been done by the said

1830.

CLARKSON v. LAWSON.

said Defendant, the said Defendant, by leave, &c. saith, that the said Plaintiff ought not, &c., because, he saith, that the said Plaintiff, before the said times when, &c. in the said declaration mentioned, to wit, on the 10th of *January* in the year last aforesaid, had been employed in the way of his aforesaid profession and business of a proctor by one *Thomas Gillart*; and afterwards and before the said several times when, &c., to wit, on the day and year last aforesaid, fraudulently and extortionately demanded of and from the said *Thomas Gillart*, as and for the sum of money justly due to him the said Plaintiff from the said *Thomas Gillart*, for the work and labour of him the said Plaintiff as such proctor done, performed, and bestowed in and about the business of the said *Thomas Gillart* in pursuance of the last aforesaid employment, and for the fees and disbursements due and made to and by him as such proctor in respect thereof, a certain large sum of money, to wit, the sum of 19*l.* 14*s.* 4*d.* Whereas in truth and in fact, the sum of money then and there justly due to him the said Plaintiff in that behalf, then and there amounted to a much less sum of money, to wit, the sum of 9*l.* 19*s.* 8*d.* And the said Defendant further saith, that afterwards, and before the said several times when, &c. to wit, on the 13th day of *February* in the year last aforesaid, Sir *John Nicholl* Knight, then being Judge of the Prerogative Court of *Canterbury*, caused the aforesaid false, fraudulent, and extortionate demand to be taxed by the proper officers of the said Court in that behalf, to wit, the Rev. *George Moore*, *Charles Moore*, Esq., and the Rev. *Robert Moore*, registrars of the said Court; and that the said officers, by their deputy in that behalf, did afterwards, and before the said several times when, &c., to wit, on the 20th day of *February* in the year last aforesaid, report in the said Court to the said Sir *J. Nicholl*, as and being such Judge as aforesaid, according to the forms and practice of the said

said Court, that, upon such taxation of the aforesaid false, fraudulent, and extortionate demand, a small part thereof, to wit, the sum of 9*l.* 19*s.* 8*d.* only, had been justly found due to the said Plaintiff from the said *Thomas Gillart.* And the said Defendant further saith, that thereupon by reason of the premises, afterwards and before the said several times when, &c., to wit, on the 19th day of *March* in the year aforesaid, the said Sir *J. Nicholl*, as and being Judge of the said Court, did order, direct, and adjudge to be suspended, and did suspend the said Plaintiff from exercising the business of a proctor of the said Court, for and during the space of one year then next following; and did then and there direct, that at the expiration of the space of one year, the said Plaintiff should be further suspended until he should appear and publicly make faithful promise to abstain from all malpractices in the future exercise of his business as a proctor in the said Court. And the said Defendant further saith, that the said Sir *J. Nicholl* in that plea mentioned, and Sir *J. Nicholl* in the said supposed libels named, are one and the same person; wherefore the said Defendant afterwards, at the said several times when, &c. did publish, and cause and procure to be published so much of the said supposed libellous matters in the said declaration mentioned as imputes or charges to or against the said Plaintiff, that he the said Plaintiff, before the said several times when, &c. had been once suspended in his aforesaid profession and business of a proctor as he the said Defendant lawfully might for the cause last aforesaid, which are the same publishing and causing to be published the said supposed libellous matters as are in the introductory part of this plea mentioned: and this &c.

Demurrer and joinder.

No general issue was pleaded.

Cross

1830.

CLARKSON v. LAWSON.

Cross Serjt. in support of the demurrer. The plea is ill; it is no answer to any allegation in the declaration. The Plaintiff complains that the Defendant charged him with having been suspended three times for extortion; and it is no answer to say that the Plaintiff has been suspended once. The imputation consists of a single assertion which is indivisible; the Plaintiff does not complain, and probably need not have complained of the Defendant's saying that he had been suspended once; that might have been at his own request, or for a single act of venial error. But the action is brought against the Defendant for saying that the Plaintiff had been suspended three times, and thereby imputing to him habitual misconduct. The Plaintiff does not complain that he has been charged with a single error, but that he has been charged with habitual misconduct. The two charges are essentially different, and the plea which should deny or confess and avoid, does not deny or confess a libel imputing habitual misconduct, but a libel imputing a single error, which is not the libel complained of. The one offers a good ground of action, when the other perhaps might have afforded none; and it can be no answer to a well founded complaint of attack on character to say, that something has befallen the Plaintiff which might not affect his character at all.

Secondly, the plea is ill for uncertainty. The declaration charges the Defendant in the first count with publishing that the plaintiff had been suspended; in the second, with publishing that the Plaintiff had been suspended for extortion: the charges are by no means identical, because suspension for extortion would render the Plaintiff infamous; suspension generally might be for an honest cause; and the plea no where points out to which of the two suspensions it is meant to apply.

The introduction of the plea "as to the publishing that the Plaintiff had been once suspended in his business

of

1830.

CLARKSON v. LAWSON.

of a proctor, as above supposed to have been done by the Defendant," is a reference to the suspensions mentioned in the declaration, and as they are two, the Defendant ought to have shewed to which of the two the plea pointed.

Wilde Serjt. The plea is sufficient, the charge of which the Plaintiff complains being clearly divisible. If the Defendant had published that the Plaintiff had been suspended on the 1st of *May*, the 1st of *June*, and the 1st of *July*, he might, after pleading to the whole declaration, have pleaded to so much of it as complained of the allegation of suspension on the 1st of *May*, for instance: and the publishing that the Plaintiff was suspended three times, is, in effect, the same thing as publishing that he was suspended on three several days. The allegation is of three several incidents, and the Defendant is at liberty to answer any one of them he may be able to meet: as if he had charged the Plaintiff with stealing three horses, he might have justified as to one.

As to the second objection, if the charge set out in the first count be supposed to differ from that of the second, the plea is sufficient; for at all events, it refers to that charge, by pursuing the language of that count of the declaration which was, "It was strange that Mr. *Peddle* should have gone to the Plaintiff who had been suspended three times;" but if it appears on the whole that the charges complained of in the two counts are substantially the same, then the words of reference "As above supposed," sufficiently point the plea to the whole complaint made in the declaration.

Cross, in reply, insisted that the body of the plea was inconsistent with the introduction, as in *Gray* v. *Pindar* (*a*),

(*a*) 2 *B.* & *P.* 427.

where

1830.
CLARKSON v. LAWSON.

where in assumpsit on a note payable by instalments; plea in bar as to the said several causes of action, except the last instalment that, "The said several causes of action did not, nor did any of them, accrue within six years;" it was holden on special demurrer, that though some of the instalments might be barred and others not, yet the introduction to the plea and the body of it were inconsistent.

TINDAL C. J. The Plaintiff has declared on a libel which imputes to him, according to the first count of the declaration, the having been suspended three times; and, according to the second count, the having been suspended three times for extortion. The plea now under consideration commences, "As to the publishing and causing and procuring to be published so much of the said supposed libellous matter as imputes or charges to or against the plaintiff that he, before the said several times when, &c., had been once suspended in his aforesaid profession and business as a proctor, above supposed to have been done by the said Defendant," and justifies in the truth as to one suspension, "Wherefore the said Defendant afterwards, at the said several times when, &c., did publish and cause and procure to be published so much of the said supposed libellous matters in the said declaration mentioned as imputes or charges to or against the said Plaintiff that he the said Plaintiff, before the said several times when, &c., had been once suspended in his aforesaid profession and business of a proctor."

On demurrer, two objections have been raised to this plea: first, that on principle the charge contained in the libel is not divisible; and secondly, that even if it be divisible, the plea is not sufficiently pointed to either of the various allegations in the declaration.

We think, however, that this charge is severable, inasmuch as the measure of damages, on an unfounded charge

charge of one suspension, would be different from the measure on an unfounded charge of three suspensions. The action of libel proceeds on the principle that there has been malice in the Defendant and damage to the Plaintiff. If the Defendant can shew that the supposed libel is true to its full extent, the allegation of the existence of malice seems to be answered. If he prove that the libel is true in part, the Plaintiff ought not to recover damage for that part of the imputation so proved to be true. And it would be hard if it were otherwise: for if that part contained, as it often might, the substance of the charge, and the Defendant were precluded from pleading because he could not answer the whole, the Plaintiff might recover damages in a case where there was neither injury nor malice. I agree that when the charge complained of is not severable in its nature, the Defendant must justify to the full extent of the charge. Upon a charge of murder, for instance, it would be no plea to allege that manslaughter had been committed, because such a plea would not confess what was imputed or any part of it. But here, when the Defendant says that the Plaintiff was suspended three times, it is no more than saying he was supended once on such a day, once on such another day, and once on a third day; and there can be no doubt he may confine his justification to one of the days, leaving the Plaintiff to establish the damage resulting from the residue of the charge. In *Stiles* v. *Nokes* (*a*), the Court expressly says, "The party who requires the separation to be made for his own defence, ought to have taken upon himself the burden of doing it, in order that the Court might see with certainty what parts he meant to justify." "A plea of justification may be good with a general reference to certain parts of the libel set forth

(*a*) 7 *East*, 492.

1830.

CLARKSON v. LAWSON.

in the declaration, if the Court can see with certainty what parts are referred to; as if the reference be to so much of the libel as imputes to the Plaintiff such a crime (*e. g.* perjury), that would be sufficient without repeating all those parts again, which would lead to prolixity of pleading, and ought to be avoided." And the plea in that case was only held ill, because the various component parts of the libel had not been sufficiently separated by the pleader.

This is a sufficient answer to the first objection. The second is, that the plea is not sufficiently pointed to the particular charge in the declaration which it is intended to meet; but it is, clearly, sufficiently applicable to the charge in the first count of the declaration, as it pursues the express language of that charge; and I am further inclined to think that by the words of reference, "above supposed to have been done by the said defendant," it may be taken sufficiently to refer to the charge of suspension for extortion.

PARK J. I am of the same opinion. The plea is, at all events, by the words of reference, sufficiently applicable to the charge on the first count, and is perfectly good in other respects. The imputation complained of, has, in effect, three dates; for, as Lord *Stowell* and Sir *John Nicholl* do not sit in the same court, the alleged suspensions must have taken place at different times; and, as in the case which has been put, of a charge of stealing three horses, there seems to be no reason why the Defendant should not justify as to one.

GASELEE J. If a party, who charges a plaintiff with having incurred three different punishments, would pay greater damages than if he had alleged only one, he must be permitted to put on record, or to give in evidence, under the general issue, whatever would exempt

empt him from a portion of the damages sought to be recovered. I am rather inclined to think that the fact of a single suspension could not have been given in evidence under a general issue on this declaration; and, therefore, the party is compelled to plead it. The introduction of the plea being pointed to the Plaintiff's having been once suspended, that suspension necessarily means, a suspension according to the manner charged in the declaration; and to the first count, at least, it distinctly applies: but the plea goes on to show, in common parlance, a suspension for extortion; for it says, "That, upon such taxation of the aforesaid false, fraudulent, and *extortionate demand*, a small part thereof, to wit, the sum of 9*l.* 19*s.* 8*d.* only, had been justly found due to the said plaintiff, from the said *Thomas Gillart*; and that, thereupon, by reason of the premises, afterwards and before the said several times when, &c. the said Sir *J. Nicholl*, as and being judge of the said court, did order, direct, and adjudge to be suspended, and did suspend, the said plaintiff from exercising the business of a proctor in the said court."

BOSANQUET J. I am of the same opinion. One plea having been pleaded to the whole declaration, there has been no discontinuance; and the defendant has a right to put a second plea on record, applicable to a portion of the charge only, where the matter is, in its nature, severable. The libel here imputes to the Plaintiff three distinct suspensions; and it certainly is open to the Defendant to justify as to one of them, and lessen the damages accordingly; for the suspensions must have been in themselves separate acts.

Then, as to the applicability of the plea, if it be taken as a plea to the charge of suspension, without specifying the cause of suspension, it is, at all events, applicable to the first count. But I think the introductory part of

1830.

CLARKSON v. LAWSON.

the plea applies as well to the second as to the first count. "Above supposed to have been done," means, as supposed by the declaration; and then the justification is for matter which, in the popular sense of the word, imports extortion.

Judgment for the Defendant, on the second plea.

May 22.

ASHWORTH and Others *v.* HEATHCOTE.

A cause in which there was no notice set off having been referred by order of *Nisi Prius*, the Judge, during the assizes, made a second order to enable the Defendant to give a particular of set off:

Held, that the 1 *G.* 4. *c.* 55. did not authorise this second order.

BY an award in this cause, after reciting "That, by a certain order of *nisi prius*, made at the assizes holden at *Stafford*, in and for the county of *Stafford*, on the 6th of *August*, in the year of our Lord 1829, a certain cause, wherein *John Ashworth* the elder, *John Ashworth* the younger, and *Thomas Ashworth*, were the Plaintiffs, and *Richard Edensor Heathcote* Esquire was the Defendant, was referred to *B. H. M.* Esquire, to settle that cause, and all matters in difference between the said parties, or any or either of them; and that also, by a certain other order of *nisi prius*, made at the same assizes, a certain cause, wherein the said *Thomas Ashworth* was the Plaintiff, and the said *Richard Edensor Heathcote* was the Defendant, was referred to the said *B. H. M.* to settle that cause and all matters in difference between the said parties therein; and that it was afterwards agreed by and with the consent of the counsel for the said several parties, that the said several orders should be acted upon as parts of one and the same order; and that also, by a certain order made on the 24th of *July* 1829, by the Honorable Sir *Stephen Gaselee*, one of the Judges of the Court of Common Pleas, in the said last mentioned cause, it was ordered that

1830.

ASHWORTH v. HEATHCOTE.

that the Defendant's attorney or agent should, within four days, deliver to the Plaintiff's attorney or agent an account in writing, with dates, of the particulars of the Defendant's set-off, and in default thereof that he should be precluded from giving evidence in support of such set-off at the trial of the cause; and that no such account was delivered within four days from the date of such order, or at any time before the said cause was called on for trial and the said last-mentioned order of *nisi prius* was made therein; and that after the making of the said last-mentioned order of *nisi prius*, and after the first meeting of the said reference, but during the continuance of the said assizes, that is to say, on the 10th of *August* in the year aforesaid, a certain order was made in the said last-mentioned cause by the Hon. Sir *John Vaughan*, one of the judges of the said assizes, whereby it was ordered that the Defendants should be at liberty forthwith to deliver the particulars of set-off in that cause, and such particulars were accordingly delivered forthwith;

The arbitrator ordered, that a verdict should be entered for the plaintiffs in the said first-mentioned action, for the sum of 70*l.* 6*s.* 4*d.* damages; and awarded and adjudged that the Defendant, in the said secondly mentioned cause, was indebted to the Plaintiff in the sum of 60*l.* 10*s.* 2*d.*, on the causes mentioned in the last seven counts of the declaration of the Plaintiff; but that the Plaintiff was indebted to the Defendant in a larger amount on the causes mentioned in the particular of set-off delivered as above mentioned; and thereupon directed, that if the Court should be of opinion that the evidence of such set-off was admissible in the cause, then the verdict in the last-mentioned cause should be entered generally for the Defendant; but, if the Court should be of opinion that the evidence of such set-off was not admissible in the said cause, but only as a matter

1830.

ASHWORTH v. HEATHCOTE.

in difference between the parties, then the verdict in the last-mentioned cause should be entered for the Plaintiff upon the said last seven counts of the declaration for the sum of 60*l.* 10*s.* 2*d.* damages, and for the Defendant upon the other counts of the declaration. And further, that the Plaintiff should, in no case, be entitled to receive the said sum of 60*l.* 10*s.* 2*d.* of and from the said Defendant, nor the Defendant to receive any sum from the Plaintiff, on account of the said set-off; but that the account between them should be considered as finally closed and balanced, except as far as regarded any payments to be made under and by virtue of that award. And lastly, that each of the said parties should bear and pay his and their own costs of that reference.

Wilde Serjt. obtained a rule *nisi* to enter up in the second cause, a verdict for the Plaintiffs for 60*l.* 10*s.* 2*d.*, on the ground, that after the order of reference, the learned Judge was *functus officio*, and had no authority to make an order enabling the Defendant to prove his set-off, especially as there was no particular of set-off, after a former order to deliver one, and the Defendant could not have entered on any such proof had he gone before a jury.

Russell Serjt. shewed cause. By 1 *Geo.* 4. *c.* 55. *s.* 5., after reciting "That it is expedient that the justices of the Courts of King's Bench and Common Pleas, and the Barons of the Exchequer at *Westminster*, and the justices of *Chester*, should have power and authority, upon their respective circuits for taking the assizes, to grant summonses, and to make orders in actions and prosecutions in the manner hereinafter-mentioned," it is enacted, "That from and after the passing of this act, it shall and may be lawful for the justices of the Courts of King's Bench and Common Pleas, and the Barons of the Exchequer

chequer at *Westminster*, and the Justices of *Chester*, and each and every, or any one of them, during their respective circuits for taking the assizes, to grant such and the like summonses, and make such and the like orders in all actions and prosecutions which are or shall be depending in any of his Majesty's Courts of record at *Westminster*, in which the issue, if brought to trial, would be to be tried upon such their respective circuits, as if such justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer, and Justices of *Chester*, were respectively judges of the Court in which such actions or prosecutions are or shall be depending, although such respective Justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer, and Justices of *Chester*, or any of them, may not be judges of the Court in which such actions or prosecutions are or shall be depending; and such summons and orders shall be of the same force and effect as if such Justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer at *Westminster*, and Justices of *Chester*, were respectively judges of the Court in which such actions or prosecutions are or shall be depending."

The judges of assize, therefore, have the same power of making an order in the cause, as any judge of the court in which the cause is depending; and a judge of the court in which the cause is depending might have made such order. An order for further time to deliver particulars, either of demand or set-off, is a common practice. The only question therefore is, whether, upon a cause having been referred, a judge has the power of making such an order respecting such cause as justice may appear to him to require.

The cause was not out of court, and applications might be made respecting it. Thus it has been held, that a

1830.

ASHWORTH v. HEATHCOTE.

party may apply for a rule to shew cause why the opposite party should not attend before the arbitrator; or why the arbitrators should not be directed to make their award without waiting for such attendance. In the case of *Hetley* v. *Hetley*, *Exchcq. Mich. Term* 1789, cited in *Kyd on Awards* 101, where a reference had been made of certain causes of action relating to the adjustment of a long train of accounts, every item of which was contested, and one of the parties neglected to carry in his vouchers before the time originally limited to the arbitrator for making his award, and the time had been repeatedly enlarged, in order to give him an opportunity of doing so, the Court made a rule upon such party to produce his vouchers before a certain day, and further to enlarge the time for making the award; and that if he still should neglect to attend, the arbitrator should proceed upon hearing the other party alone. And the order of reference may be amended. The Court of Common Pleas amended an order of *Nisi Prius* (made a rule of court), by inserting certain omitted matters which were incident to the substance of the agreement between the parties: *Evans* v. *Senor*. (*a*)

So, where an order of *Nisi Prius* had been obtained upon the usual terms of filing no bill in equity, the Court permitted it to be amended by striking out those words, as it appeared that a bill in equity was necessary in order to attain the justice of the case: *Grimstone* v. *Bell*. (*b*) In the present case, the order of Mr. Baron *Vaughan* could not operate beyond an amendment of the order of reference, and was made according to the justice of the case between the parties.

Wilde, *contrà*, was stopped.

(*a*) 5 *Taunt*. 662. (*b*) 4 *Taunt*. 254.

TINDAL

1830.

ASHWORTH v. HEATHCOTE.

TINDAL C. J. The point is exceedingly simple. This was a reference of a cause at *Nisi Prius:* that is, of the cause as it then stood, without any particular of set-off, after a notice to deliver one, which is the same as if there had been no notice of set-off. After the reference the Judge made an order, that a particular of set-off might be delivered, which was virtually to put the Defendant in a situation, circumstanced as the cause then was, in which he had no right to stand. The Judge could not remedy the consequences of the Defendant's neglect; and the making this rule absolute will occasion no injustice, for the party will stand in the same situation as if he had gone to a jury. No set-off being suggested on the record, the verdict must have gone against him.

PARK J. I am of the same opinion. By 1 *G.* 4. *c.* 55. *s.* 5., the Judge at the assizes is permitted to make such orders as if he were a Judge of the Court in which the cause is depending, but he has no jurisdiction when the cause is out of Court. In *Rawtree* v. *King* (*a*), the Court said they could not amend an order of reference.

GASELEE J. The party has placed himself in this situation by his own neglect.

BOSANQUET J. concurring, the rule was made

Absolute.

(*a*) 5 *B. M.* 167.

1830.

May 24.

CHAPMAN v. PRICKETT.

Devise of testator's freehold messuages, stock in the funds, money and debts, and all shares or *property* which he might be possessed of or entitled to, to trustees and their executors, in trust for testator's wife and children, &c.

Codicil devising testator's copyhold to his wife till the expiration of certain leases, and after that to be sold, and the money to be placed in the funds for the benefit of testator's children, as directed in the will:

Held, that the trustees took no interest in the copyhold, and that the wife's interest terminated on the expiration of the leases.

THIS was an action of replevin for taking and detaining the Plaintiff's goods in a dwelling house, at *St. Mary's, Islington.*

The Defendant pleaded several cognizances, *viz.*

1st. As bailiff of *John Hodsoll*, under a distress for 126*l.* for three years' rent, due 25th *March* 1828, under a demise, at the yearly rent of 42*l.* payable quarterly.

2dly. The like for 42*l.*, one years' rent, due to *John Hodsoll*, 25th *March* 1828.

3dly. The like cognizance as bailiff of *John Burton*, for 126*l.* for three years' rent, due 25th *March* 1828, under a demise, at the yearly rent of 42*l.* payable quarterly; and

4thly. The like avowry for 42*l.* for one year's rent, due to *S. Burton*, 25th *March* 1828.

Pleas in bar,

1st. That Plaintiff did not hold or enjoy as tenant to said *John Hodsoll*, or said *John Burton*, as stated in the several cognizances, and

2dly. That no rent was in arrear.

Upon the trial of the cause before *Tindal* C. J. a verdict was taken for the Plaintiff for the sum of 4*l.* 4*s.* with liberty to enter a verdict for the Defendant for 126*l.* the rent distrained for, subject to the opinion of the Court on the following case:—

The premises in question, a dwelling-house in the parish of *St. Mary, Islington*, were copyhold, holden of the manor of *Barnesbury*.

Thomas Lambe being seised thereof according to the custom of the manor, and having surrendered the same, (amongst

1830.

CHAPMAN v. PRICKETT.

(amongst other copyhold premises held of the said manor,) to the uses of his will, and being also seised of several freehold estates, by his will, bearing date 21st *June*, 1804, duly executed and attested to pass real estates, gave and devised, among other things, as follows:

"I give and devise unto *John Hodsoll*, *of Cary Street*, *Lincoln's Inn*, esquire, and *Joseph Boucock*, of the *Old Baily*, stone mason, and the survivor of them, or the executors, or administrators of such, all those my freehold messuages in *Furnival's Inn Court*, *Holborn*, and also all my stock or shares in any of the public funds, and all money in hand, or debts due to me, to be placed in the 3 per cent. Consols Bank of *England*; and all shares or property whereof I may be possessed or entitled to, upon this special trust and confidence, that they my said trustees shall and do permit and suffer my wife, *Maria Dove Lambe*, to receive and take for and during the term of her natural life, all rents and profits of the said messuages, and all other freeholds or leaseholds that I may be possessed of, and the entire dividends and proceeds of the said stock or shares in the Bank of *England*, except the presents hereinafter mentioned, for the support and maintenance of herself, and all my legitimate issue, which I now have, or may hereafter have by her, except as follows; that is to say, in case my reputed son, known by the name of *Thomas Lambe*, shall live to attain the age of twenty-one years, I will and direct that they my said trustees shall and do with all convenient speed, transfer and assign over to him 200*l.* stock of the 3 per cent. Consols of the Bank of *England*, part of my stock or share therein, and to have no other claim on my property whatsoever, but to be in full of all bequests from me to him: and I do hereby further will and direct my said trustees to assign and transfer unto such and every of my lawful children the like sum of 400*l.*

3 per

1830.

CHAPMAN v. PRICKETT.

8 per cent. Consols, part of my stock or share therein, when and so soon as they shall respectively attain their respective ages of twenty-one years: and from and after the decease of my said wife, and all my children have attained the age of twenty-one years, I will and direct that my said trustees, or the survivors of them, or the executors, or administrators of such survivors, do and shall make an equal division among and between all my said children and their heirs, of my said three freehold messuages either by sale or otherwise, as may be deemed most conducive to the interest of my said children; and also do and shall in like manner transfer over unto my said children all the remaining part of my stock or share in the 3 per cent. Consols, Bank of *England*, and all stock or shares, my property, estate, and effects, and to divide the same in equal shares and proportions among and between all my said children and their heirs."

And the said testator thereby appointed the said *John Hodsoll* and *Joseph Boucock*, and his widow, executors, and executrix of his will.

The testator afterwards made the following codicil.

"I, *Thomas Lambe*, do hereby will and direct that my copyhold estate, in *Church Street*, *Islington*, be transferred to my beloved wife, *Maria Dove Lambe*, until the expiration of the leases, and after that time, as soon as convenient, or within one year, to be sold by public auction, the money to be placed in the 3 per cent. Bank of *England* stock, for the benefit of my children, and their heirs, as directed in the will. If it should please God to call her before that time of the expiration of the leases, the copyhold to be sold by public auction, soon as convenient, and the money placed as above directed. *N.B.* If there should not be money sufficient in my possession at the time of my decease to pay the fine of the copyhold, proving the will, and funeral

1830.

CHAPMAN v. PRICKETT.

funeral expenses, my executors to sell out of the 3 per cent. Consols 600*l.* or a small sum as may be required.

"Witness my hand, *Thomas Lambe.*"

The testator died, without having altered or revoked his will or codicil, on the 11th of *May* 1806, seised of the copyhold in question.

The testator left his wife, the said *Maria Dove Lambe*, and three lawful children by her, surviving himself, viz. *Joseph Lambe*, *Maria Dove Lambe* the younger, and *Harriett Lambe.*

The will and codicil were proved by the widow and the said *John Hodsoll* and *Joseph Boucock* in the prerogative court of *Canterbury*, on the 23d of *May* 1806.

On the 11th of *July* 1806 the said *John Hodsoll* and *Joseph Boucock* were admitted tenants of the premises in question on the court rolls of the manor as devisees in fee at the will of the lord, pursuant to the will and codicil of the testator, and upon the trusts therein mentioned. The admission stated the testator's surrender to the use of his will, his devise to *Hodsoll* and *Boucock* of "all his property whereof he might be possessed or entitled," upon certain trusts in the will and codicil particularly mentioned, and described the copyhold tenements, of which the lord of the manor by his steward did deliver seisin by the rod according to the custom of the manor, to hold the said premises, with the appurtenances, unto the said *Hodsoll* and *Boucock, and their heirs*, pursuant to the said will, of the lord of the manor, by the rod, &c.

The said *Maria Dove Lambe*, the widow, on the 12th of *August* 1807, intermarried with *John Burton*, one of the persons under whom the Defendant made cognizance; and she died on the 23d of *November* 1823, without having had issue by the said *John Burton.*

The three legitimate children of the testator all died in

1830.

CHAPMAN v. PRICKETT.

in the lifetime of their mother under the age of twenty-one years, unmarried and without issue.

Letters of administration of the personal estate of the said Mrs. *Burton*, and of the testator's said three infant children, were granted by the prerogative court of the Archbishop of *Canterbury* to the said *John Burton* at the times following: namely, of the personal estate of the said Mrs. *Burton*, on the 3d of *February* 1824; of the said *Joseph Lambe*, *Maria Dove Lambe* the younger, and *Harriett Lambe*, on the 9th of *February* 1824.

The said *Joseph Boucock* died on the 5th of *February* 1825, leaving the said *John Hodsoll*, who was the other person under whom the Defendant made cognizance, him surviving.

The lease mentioned in the will of the premises in question expired the 25th of *December* 1821.

Plaintiff was let into possession by Mrs. *Burton* in *October* 1823, to hold from *Michaelmas* preceding, at the yearly rent of 42*l.*, payable quarterly; and remained in possession from that time up to the time of the distress.

The question for the opinion of the Court was,

Whether, upon the facts stated, the Defendant was entitled to a verdict upon any or either of the cognizances before mentioned.

If the Court should be of opinion the Defendant was entitled to a verdict under either of the said cognizances, then a verdict was to be entered for the Defendant for such sum as the Court should direct, and the value of the goods distrained to be taken as of the value equal to the rent in arrear.

But if the Court should be of opinion that the Defendant was not entitled to a verdict upon either of the cognizances, then the verdict was to stand.

This case was argued twice. *Wilde* and *Scriven* Serjts.

Serjts. for the Plaintiff. *Lawes* and *Taddy* Serjts. for the Defendant.

For the Plaintiff it was argued, that none of the cognizances could be sustained: for first, the copyhold did not pass under the will to the trustees; and secondly, whatever interest in them passed to the widow of the testator under the codicil, determined on the expiration of the leases in 1821, or at all events on her death; so that her executor had no interest during any portion of the time covered by the cognizances under him.

The copyholds did not pass. The word *property*, the only word on which an argument can be raised, has always been construed to mean personal property, unless an intention appear on the will that it should be applied to freehold. From *Rose* v. *Bartlett* (*a*) to *Thompson* v. *Lawley* (*b*), this has been the uniform decision of the courts: and any generality of expression in a will may be limited by particularity of intention, made apparent in other parts of the will or codicil: *Timewell* v. *Perkins* (*c*) *Rowe* v. *Yeud* (*d*), *Doe* v. *Hurrell* (*e*), *Newland* v. *Marjoribanks* (*g*), *Doe* v. *Rout* (*h*), *Monk* v. *Mawdsley* (*i*) *Woollam* v. *Kenworthy*. (*k*) Here, so far from any intention to pass real property of any kind under the word *property*, a contrary intention plainly appears: for the testator having first disposed of his freehold property, then proceeds to his personalty; namely, stock in the funds, money in hand, debts due, and then, all shares or property of which he might be possessed; clearly meaning property of the same nature as shares. But the codicil makes the matter still plainer, for he there disposes of the copyhold as something which he had

(*a*) *Cro. Car.* 292.
(*b*) 2 *B.* & *P.* 303.
(*c*) 2 *Atk.* 102.
(*d*) 2 *N. R.* 214.
(*e*) 5 *B.* & *A.* 18.
(*g*) 5 *Taunt.* 268.
(*b*) 7 *Taunt.* 79.
(*i*) 1 *Sim.* 286.
(*k*) 9 *Ves.* jun. 137.

omitted

1830.

CHAPMAN v. PRICKETT.

omitted to pass by his will; and the trustees, being neither named in nor referred to by the codicil, can take nothing under it.

The circumstance of their having been admitted makes no difference in the case, because admission will not confer any interest on a party who possesses none independently of such an admission, nor, if he have any interest, will the admission, however extensive in its terms, confer a greater interest than he is really entitled to. *Co. Copy*, s. 41. *Baddeley* v. *Leppingwell* (*a*), *Zouch* v. *Forse*. (*b*)

But assuming that the trustees took any interest under the will, or codicil, or both together, they took it only for the purposes of carrying into execution the trusts of the will and codicil; they would, therefore, take no greater interest than was necessary for the due execution of the trusts; *Doe* v. *Simpson* (*c*), *Doe* v. *Barthrop* (*d*), *Doe* v. *Nicholls* (*e*), *Doe* v. *Timins* (*g*) *Hawker* v. *Hawker* (*h*); and a fee was not necessary for the purposes of the present will: a mere power to sell would have sufficed.

For the Defendant it was argued, that the trustees took a legal fee under the will and codicil taken together, in order to enable them to carry into execution the trusts expressed therein. Unless they took a fee when they entered on the trust, they could not have been in a situation to sell and divide the property after the death of the widow; and if they once took a fee, there was nothing in the will to defeat that amount of interest at a subsequent period. It could scarcely be disputed that they took an interest greater than for life by the express words of the will, and if so, such an

(*a*) 3 *Burr.* 1533.
(*b*) 7 *East*, 186.
(*c*) 5 *East*, 162.
(*d*) 5 *Taunt.* 382.
(*e*) 1 *B.* & *C.* 336.
(*g*) 1 *B.* & *A.* 530.
(*h*) 3 *B.* & *A.* 537.

interest

interest could only be abridged or defeated by something incompatible with it appearing on the will.

In *Doe* v. *Nicholls* (*a*), where a testator devised to trustees, in trust for his only son, all his freehold and copyhold lands, *to be transferred* to him as soon as he should attain to twenty-one years of age; and, in case he should die before he attained to the age of twenty-one years, then to *A. B.*, his heirs and assigns: It was held, that the trustees took in the copyhold lands an estate for years determinable on the son's attaining the age of twenty-one years, or by his death before that period.

But if any thing remains to be done by the trustees, though a mere matter of form, as, to support contingent remainders; *Biscoe* v. *Perkins* (*b*); their estate continues.

Then, the word *property* in the will was sufficient to pass copyhold, if such appeared to be the testator's intention; *Nicholls* v. *Butcher* (*c*), *Noel* v. *Hoy* (*d*); and assuming such intention to be apparent, the operation of the word is not limited by its being accompanied with words designative only of personal property, as *shares*, &c.

In *Doe* v. *Langlands* (*e*), a testator possessed of real and personal property, after several pecuniary legacies, "gave and bequeathed all and every the residue of his *property*, goods and chattels, to be divided equally between *A.* and *B.*, share and share alike, after all his debts paid;" the personalty was not quite sufficient to pay all the debts and legacies, but it was held, that the word *property*, though thus followed by *goods and chattels*, was sufficient of itself to carry the realty.

And in *Doe d. Andrew* v. *Lainchbury* (*g*), it was held, that a devise of all the residue of the testator's "money, stock, *property*, and *effects*, of what kind or nature soever," to *A.* and *B.*, "to be divided equally between

(*a*) 1 *B.* & *C.* 336.
(*b*) 1 *Ves.* & *B.* 485.
(*c*) 18 *Ves.* jun. 193.
(*d*) 5 *Madd.* 38.
(*e*) 14 *East*, 370.
(*g*) 11 *East*, 290.

1830.

CHAPMAN v. PRICKETT.

them, share and share alike," would pass *real* as well as *personal* estate, where from other parts of the will it appeared that the testator had applied the words *property* and *effects* to real estate. As where he began his will by stating, "as to my money and *effects*, I dispose thereof as follows," &c., and then proceeded to dispose of parts of his *real* estate.

Now, it cannot be supposed that the testator here meant to die intestate as to his copyhold property, after having expressly mentioned it in his codicil. But, by his codicil, he does not devise the copyhold to his widow immediately; he directs "that it be transferred to her:" And unless it passed to the trustees under the word *property* in the will, who was to transfer it? This transfer was one of the trusts for which the trustees were named. There is no ground for the argument that a mere power would have sufficed, since the devise to the trustees is direct, and conveys an interest. It is a devise to them in trust to sell, &c., and not a mere direction that the property shall be sold. *Co. Lit. s.* 169. *Sugd. on Powers*, 174., and the authorities there cited.

Assuming, then, that the widow had a trust estate in the copyhold, her connection with the trustees is sufficient to raise a privity between them and the tenant. In *Gree* v. *Rolle* (*a*), an entry by a *cestui que* trust was held sufficient to prevent the statute of limitations from running against the trustee. The death of the widow did not determine her interest; it only enabled the trustees to sell according to the trusts of the will: and till they have effected a sale, the widow's interest continues in her executor.

Cur. adv. vult.

TINDAL C.J. This is an action of *replevin*, in which the Defendant first makes cognizance as bailiff of *John*

(*a*) 1 *Ld. Raym.* 716.

Hodsoll

1830.

CHAPMAN v. PRICKETT.

Hodsoll for rent due the 25th of *March* 1828; and secondly, as bailiff of *John Burton* for the same rent; and the question raised by this special case becomes this, — whether the trustees took such estate in the copyhold under the will or codicil as to support the cognizance in the name of the surviving trustee, or whether the wife took such interest therein under the codicil as to support the cognizances in the name of her personal representative.

And looking at the will and codicil, which are framed very inartificially, with the view of discovering the intention of the testator, we think he did not intend to pass by his will any interest in the copyhold premises in question to the trustees named therein.

The testator appears to have known the distinction between freehold, copyhold, and leasehold property; for his will begins with the express devise to his trustees of three freehold messuages, and then gives direction as to the rents and profits of the same messuages, and all other *freeholds* or *leaseholds* that he might be possessed of, and lastly directs the division of his said three *freehold* messuages, either by sale or otherwise, amongst his children. Looking, therefore, at the will alone, we see no words which would comprehend the copyhold within the devise to the trustees, for the word *property* in the will cannot be held to refer to real property without doing violence to the context of the clause in which that word occurs; and when it appears that the testator, after making his will, though how long after is left uncertain, makes a codicil specifically disposing of his copyhold, it affords a strong ground of inference that the testator thought his copyhold property was not included in his will; and it still further supports this construction, that the general effect of the disposition of the copyhold by the codicil is the same as that of the freehold which had already passed by the will, viz. that the wife of the testator should receive the rents and profits during her

1830.

CHAPMAN v. PRICKETT.

life, and after her death a sale should take place and a division be made amongst the children. So that the disposition of the copyhold made by the codicil would appear to have been unnecessary, except upon the supposition that the testator thought he had not disposed of it by the will.

If, then, the copyhold did not pass by the will, as we think it did not, so neither did it pass to the trustees by the codicil; for they are not named in the codicil either expressly or by any necessary implication: so that, upon the whole, there appears no estate in the trustees out of which the relation between landlord and tenant could be created, and the cognizances in the name of the surviving trustee do therefore altogether fail.

The second cognizance depends on the nature of the interest which the wife took under the codicil: and it appears to us that it was the manifest intention of the testator, that her interest in the respective parts of the copyhold should be co-extensive with the leases which were then in existence of those respective parts, unless in the event of her death before the determination of the respective leases, in which case her interest was to determine with her life. And as the case finds that the lease which includes the premises for the rent of which this distress was taken, expired on the 25th of *December* 1821, it follows that the whole of the rent distrained for accrued since the time when the wife's interest under the codicil had expired, and consequently that there could be no holding by the tenant under her personal representative.

We therefore think, upon the second cognizance also, the verdict must be entered up for the Plaintiff; that he did not hold under *Burton*, as the Defendant has alleged; and that, upon the whole, the verdict is to stand as entered for the Plaintiff.

Judgment for the Plaintiff.

1830.

DOE dem. PEARSON *v.* ROE.

May 24.

A mortgagee is not permitted, under 11 *G.* 2. *c.* 19. to come in and defend as landlord in ejectment, unless he be interested in the result of the suit.

STORKS Serjt. had obtained a rule *nisi* for a mortgagee to be permitted to defend in this cause as landlord.

The affidavit of the mortgagee, on which the motion was made, did not state that the mortgagee had any interest in the question between the contending parties; on the contrary, it was rather to be collected that the mortgagee was put forward to serve the purposes of the tenant; upon which,

Wilde Serjt., who shewed cause, contended that the Court ought not to permit the mortgagee to defend as landlord, unless he had an interest in the question between the parties.

Storks. He may be presumed to have an interest in any question touching the land conveyed to him, and is always admitted to defend, unless a case of collusion be clearly made out. *Doe* d. *Tilyard* v. *Cooper* (*a*).

TINDAL C. J. This is a motion under the 11 *G.* 2. *c.* 19., by which the Court is enabled to allow the landlord to make himself a Defendant in an ejectment for property demised by him, upon certain terms prescribed by the statute; and, under that statute, a mortgagee has sometimes been considered as a landlord. But the question to be considered in all cases is, whether he be himself interested in the result of the suit, or whether he be

(*a*) 8 *T. R.* 645.

1830.

Doe dem. Pearson v. Roe.

merely set in motion for the purposes of some other person; and, upon the affidavits before us, we think that the latter is the case in this instance. The mortgagee does not swear that he is himself interested in the result, and it is probably immaterial to him under whom the tenant immediately holds. We think, therefore, he does not bring himself within the terms of the act, by shewing that this is his own motion, and the rule must be

Discharged.

May 24.

Blogg *v.* Kent.

Plaintiff declared on an agreement to employ him at the end of a year.

Defendant pleaded the general issue, and that there was no memorandum in writing of the agreement, as required by the statute of frauds. Plaintiff replied, that there was such a writing: Held, he was bound to permit an inspection of it by Defendant, although it consisted only of a letter from Defendant's agent.

THE Plaintiff declared on an agreement to take him into a certain employment at the end of a twelvemonth.

The Defendant pleaded, first, the general, issue; secondly, that there was no memorandum of the agreement in writing signed by the party to be charged, or his agent, as required by the statute of frauds.

The Plaintiff replied, that there was such a writing; on which the Defendant joined issue, and obtained a judge's order for an inspection of the writing.

Taddy Serjt. moved to discharge this order, on an affidavit that the writing referred to in the replication consisted only of letters from the Defendant's agent.

He submitted, that such letters did not constitute the agreement, but were merely evidentiary of it; and that therefore the Defendant was not entitled to an inspection.

Wilde

1830.

BLOGG v. KENT.

Wilde Serjt., who shewed cause, urged, that upon these pleadings the Plaintiff could not succeed, unless he shewed an agreement in writing; and as he admitted by his replication he held such a writing, he must, upon the principle of all the cases on the subject, be considered a trustee for both parties, and bound to produce the writing.

Taddy. The present case goes beyond all that have preceded it, in calling for documents which are only evidence of a contract, and not the contract itself. If the Defendant had pleaded the general issue only, he would not have discovered the existence of the writing; and he ought not to be placed in a better situation by putting on the record a plea unnecessary to his defence, since the matter advanced in it might have been taken advantage of under the general issue.

TINDAL C. J. Upon the whole of these pleadings it appears that there is a memorandum in writing of the agreement, on which the Plaintiff proceeds. I think no objection arises from the circumstance of there being two pleas; for the purposes of this application it must be taken as if there were but one, and then the replication virtually inserts in the declaration an averment of an agreement in writing. It appears that one party only has a copy; and it comes round to the ordinary case, that where there is only one copy of the contract in dispute between the parties, the party who holds it is a trustee for the production of it to the other party. The writing, therefore, must be produced to the Defendant, and the rule for setting aside the judge's order be

Discharged.

1830.

May 24.

GODEFROY *v.* JAY.

A plea of privilege, after a special imparlance, is ill on demurrer; but the Plaintiff cannot treat it as a nullity, and sign judgment.

IN this action the Defendant, after imparling with a saving of all exceptions to the writ, pleaded his privilege as an attorney of the Court of King's Bench.

The Plaintiff treated the plea as a nullity, and signed judgment; whereupon *Cross* Serjt. obtained a rule *nisi* to set aside the judgment as irregular.

Wilde Serjt. The plea is a nullity, and the Plaintiff is entitled to judgment. It is a plea to the jurisdiction of the Court; *Chatland* v. *Thornley* (*a*); and a plea to the jurisdiction of the Court cannot be pleaded after a *special* imparlance, with a saving of all exceptions to the *writ*, *bill*, or *count*: if it be proposed to plead such a plea after imparlance, the Plaintiff must obtain, by application to the Court within the first four days of term, a *general special* imparlance, with a saving of all advantages and exceptions *whatsoever* (*b*). Without such a condition, it would be inconsistent for the Defendant to disclaim the jurisdiction of a Court of which he had claimed an indulgence.

Cross. This is not a plea to the jurisdiction, but a plea of privilege; and *Bac. Abr. Pleas* (E.) and *Gilb. Hist. C. P.* 185., are authorities to shew that it may be pleaded after a special imparlance. Even if it were otherwise, the question is at least a question of nicety and difficulty, which was debated on demurrer in *Wentworth* v. *Squibb* (*c*); and the Plaintiff should have demurred

(*a*) 12 *East*, 544.
(*b*) 2 *Wm. Saund.* 2. n. (2). *Bac. Abr. Abatement* (C).
(*c*) 1 *Lutw.* 43. 640.

murred or have applied to the Court, instead of snapping a judgment and treating as a nullity a plea the validity of which was at least a matter for discussion.

1830.

GODEFROY v. JAY.

TINDAL C.J. We think that this plea would not have been sustainable, if demurred to: at the same time, as the question involved a point of nicety, the party was not entitled to treat the plea as a nullity. The judgment, therefore, must be set aside, on condition of the Defendant's pleading to the merits of the action.

Rule absolute.

CARTER, Assignee of PEER, a Bankrupt, *v.* BRETON.

May 24.

TROVER by the plaintiff, as assignee of *Peer*, for four horses.

At the trial before *Tindal* C. J. *Middlesex* sittings after *Hilary* term, it appeared that after *Peer* (a coach proprietor) had committed the act of bankruptcy on which the commission issued, and which act was unknown to the Defendant, the Defendant accepted a bill of exchange for 98*l.* at three months for *Peer*'s accommodation; this bill was immediately transferred by *Peer* to *Bamford*, one of his creditors, who carried it away.

After this transaction, but in the course of the same day, *Peer* and the Defendant had a conversation as to security to be given to the Defendant in consideration of his acceptance; and it was agreed between them that *Peer* should

After a secret act of bankruptcy by *P.*, Defendant accepted a bill of exchange for him for 98*l.* at three months, which *P.* paid to a creditor standing by; later, in the course of the same day, *P.* agreed to sell Defendant four horses as security for 70*l.* of the 98*l.* The horses were subsequently delivered to the Defendant, who paid the 98*l.* bill when it became due:

Held, that the transaction was not protected by the eighty-second section of 6 *G.* 4. *c.* 16.

1830.

CARTER v. BRETON.

should sell to the Defendant, for 70*l.*, the four horses which were the subject of the present action. In order to accommodate *Peer*, he was permitted for a short time to continue to employ them with his coach; but they were subsequently delivered to the Defendant, who paid the 98*l.* bill when it became due. The commission was issued against *Peer* within two calendar months of the Defendant's accepting the bill of exchange. The jury found that there was a *bonâ fide* sale of the horses, and gave their verdict for the Defendant.

Spankie Serjt. obtained a rule *nisi* for a new trial on various grounds, but the decision of the Court turning exclusively on the question, whether or not the above transaction amounted to a sale under the eighty-second section of 6 *G.* 4. *c.* 16., this report of the previous discussion is also limited to that point.

Wilde Serjt., who shewed cause, relied on the finding of the jury: he maintained also that the whole dealing between the Defendant and *Peer* was one transaction; that the Defendant had in effect purchased the horses, by paying, at *Peer*'s request, a creditor of *Peer*'s; that it was immaterial whether the horses were paid for by money or bills, and equally so whether the money or bills were put into *Peer*'s hands, or at his request into the hands of his creditor standing by. The manifest object of the statute was to protect *bonâ fide* transfers, and there was nothing to impeach the *bona fides* of this.

In *Hill* v. *Farnell* (*a*), where *A.* purchased of *B.*, a hop merchant, a library, and paid him the value, and *B.*, at that time, had committed an act of bankruptcy, of which *A.* had no knowledge; it was held, that the assignees could not recover the value of the books, without at least tendering the price, inasmuch as the payment

(*a*) 9 *B.* & *C.* 45.

made

made by *A.* was declared valid by the 6 *G.* 4. *c.* 16. *s.* 82.; and in order to give full effect to that enactment, *A.* must at least have a lien on the books, in respect of which he had made the payment, until the assignees tendered him the sum paid. *Cash* v. *Young* (*a*) is a decision to the same effect on the statute 1 *Jac.* 1. *c.* 15. *s.* 14., which protected payments made in the ordinary course of trade.

Spankie. The *bona fides* of the transfer will not entitle the Defendant to retain these horses, or protect the transaction, unless it can be said to amount to a payment to a creditor of the bankrupt on the day of the transfer, within the meaning of the eighty-second section of 6 *G.* 4. *c.* 16., which enacts, "that all payments really and *bona fide* made by any bankrupt, or by any person in his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed." Here, were two separate transactions: the acceptance of the bill for the accommodation of the bankrupt; and subsequently the transfer of the horses by the bankrupt to the acceptor, by way of security for the payment of the bill, for which he had made himself responsible. At the time of the acceptance, and transfer of the bill to *Bamford*, the transfer of the horses to the Defendant had never been thought of. It is impossible, therefore, to say that the bill was given to the creditor as payment for the horses. It was given as an accommodation to the bankrupt; and the horses were afterwards made over to the acceptor in return for that accommodation. It would be a violent application of the ὑστερον πρoτερον, to call this a sale. In *Hill* v.

(*a*) 2 *B.* & *C.* 413.

Farnell,

1830.
CARTER
v.
BRETON.

Farnell, the transaction was at least *uno flatu*, though even there it was doubted whether the assignees had not the right to rescind it; and in *Cash* v. *Young* there was a payment to a creditor. But in *Bishop* v. *Crawshay* (*a*), where *A.*, a merchant in *London*, ordered goods to be made by *B.*, a manufacturer in the country; the goods were made to order, but, before they were forwarded to to *A.*, *B.* committed an act of bankruptcy, and afterwards shipped the goods, having previously, but after the act of bankruptcy, drawn upon *A.* a bill of exchange for a larger sum than the price of the goods ordered, which bill *A.* accepted, not then knowing that *B.* had committed an act of bankruptcy: the goods having afterwards come to the possession of *A.*, it was held, that the assignees were entitled to recover them, because the property in them remained in the bankrupt, both at the time when the act of bankruptcy was committed, and when the bill was accepted by *A.*, and therefore this was not a payment protected by the 1 *Jac.* 1. *c.* 15. *s.* 14., because *A.* was not a debtor of *B.* at the time when the acceptance was given.

Cur. adv. vult.

TINDAL C. J. One question in this case, and the only one upon which it is necessary to give a decision, is, whether the transaction between the bankrupt and the Defendant, under which the delivery of the horses was made, falls within and is protected by the eighty-second section of the statute 6 *G.* 4. *c.* 16.

The Defendant, at the request of the bankrupt, after the committing of a secret act of bankruptcy, accepts a bill of exchange for 98*l.* for the bankrupt's accommodation, which bill is paid to *Bamford*, a creditor of the bankrupt, who carries the same away.

(*a*) 3 *B.* & *C.* 415.

In

1830.

CARTER v. BRETON.

In the course of the same evening, but after that transaction is completed, the bankrupt and the Defendant have further conversation as to the security to be given to the Defendant, and it is agreed between them that the bankrupt shall sell to the Defendant four of his horses, being the same horses for which this action of trover is brought, for 70*l.*, being part of the amount of the acceptance. The horses are at a subsequent time put into the possession of the Defendant, and the bill for 98*l.* is paid by the Defendant when it arrives at maturity.

These are the facts of the case. It is contended by the Defendant, that the transaction is protected by the eighty-second section of the statute, on the authority of the two cases to which he has referred. It is to be observed, that in each of these cases, the transaction was that of a direct distinct sale and payment of the price; and the Court of King's Bench held the earlier case to be within the protection of the 1 *Jac.* 1. *c.* 15., and the latter within the eighty-second section of the recent act, not upon the ground that the property passed by the sale, but that the payment could not be deemed a valid payment for any beneficial purpose to the party paying, unless he was allowed to retain the goods so long as he was kept out of the money. In fact, no one of the bankrupt acts protects a sale by the bankrupt, as a sale, but merely the payment of the price.

But this case appears to us not to be so much a sale of goods with payment of the price, as a sale of goods with an agreement to set off the price against a liability on the part of the bankrupt.

It would be dangerous to extend the application of the decided cases so as to give effect to a set-off in consequence of a subsequent sale.

This was an acceptance lent by the Defendant for a larger sum, without any reference to the sale of the horses, which was not then thought of; and whether at a short

1830.

CARTER v. BRETON.

a short interval before, or at a long one, can make no difference in the principle of the decision. Treating, therefore, the acceptance by the Defendant, which was afterwards honoured, as an actual advance of money, which is the most favourable way of considering it for the Defendant, the transaction amounts to no more than a set-off of the price of the horses against a by-gone debt; which set-off is agreed upon after a secret act of bankruptcy: and we do not think this can, in any point of view, be considered a payment within the eighty-second section of the act.

The case seems to us to come nearer that of *Bishop* v. *Crawshay*, cited by the Plaintiffs, than that of *Hill* v. *Farnell*.

The consequence is, that a new trial must be had.

Rule absolute.

REGULA GENERALIS.

IT IS ORDERED by the Court, that, in future, in *Hilary* and *Trinity* terms, no motion for a new trial shall be heard, unless such motion be actually made within the first four days of each of the said terms.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
J. B. BOSANQUET.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term,

In the Eleventh Year of the Reign of GEORGE IV.

LAFITTE *v.* SLATTER.

June 12.

ACTION by indorsee on a bill of exchange for 315*l.* 16*s.* 10*d.*, drawn by Defendant *February* 18. 1829, at four months after date, and accepted by *Henry Tebbs*, payable at Messrs. *Barnetts* and Co. *Lombard Street*.

About a fortnight after the bill became due, the Defendant received a letter from the Plaintiff's attorney demanding payment, but no express notice of dishonour was ever given, and the Plaintiff sought to supply the omission by shewing that the Defendant had no effects in the hands of *Tebbs*, and knew the bill would not be paid by him: as to which, the evidence was, a conversation between the Defendant and *Tebbs* in *May* 1829, when *Tebbs* said that he had received no

The drawer of a dishonoured bill is entitled to notice of dishonour, although he knows the bill will not be paid by the acceptor, provided he has reason to expect it will be paid by any other person, or has a remedy over against such person.

1830.

LAFITTE v. SLATTER.

value for the bill; that he had not the means of taking it up; and that he was a ruined man, in consequence of the conduct of one *Rose*, who had got him to accept the bill. The Defendant expressed surprise, saying *Rose* had told him that *Tebbs* was indebted to him, *Rose*. *Tebbs* denied the existence of any such debt: but it was explained to him that the Defendant was not the person to pay the bill, he having reason to expect that *Rose* would provide funds for the payment, and that at all events, if *Rose* did not pay, the Defendant would have a remedy over against *Rose*.

Tebbs and the Defendant had never had any transactions together, but it came out that *Rose* owed the Defendant 1000*l*.

A verdict having been found for the Plaintiff, at the trial before *Tindal* C. J., *London* sittings after *Michaelmas* term last, with leave for the Defendant to move to set it aside and enter a nonsuit,

Wilde Serjt. moved accordingly. The drawer of a bill is *primâ facie* entitled to notice of dishonour; the party who sues must establish the ground of dispensation, if any exist, and there is seldom such a coincidence of circumstances as to admit of such dispensation. It must be shewn, that neither when the bill was drawn, nor when it became due, had the acceptor any assets in respect of which there was a reasonable expectation the bill would be paid; it should also be shewn, that neither among the parties to the bill, nor elsewhere, were there any one against whom the drawer had any expectation of reimbursing himself; for if he have any such expectation, he is entitled to notice, in order that he may enforce his claim without delay. The mere circumstance that the party sued knew the bill would not be paid by the acceptor, does not dispense with the necessity of giving him notice of dishonour. *Staples* v. *Okines*,

1830.

LAFITTE v. SLATTER.

Okines (*a*), *Clegg* v. *Cotton* (*b*), *Whitfield* v. *Savage* (*c*), *Esdaile* v. *Sowerby* (*d*); where Lord *Ellenborough* said, "As to knowledge of the dishonour by the person to be charged on the bill, being equivalent to due notice of it given to him by the holder, the case of *Nicholson* v. *Gouthit* is so decisive an authority against that doctrine, that we cannot enter again into the discussion of it;" and *Bayley* J., "It was said in *Tindal* v. *Brown* (*e*), that notice means something more than knowledge." In *Cory* v. *Scott* (*g*) *Abbott* C. J. said, "That decision, which substituted knowledge for notice, I have always regretted, because it introduced nice distinctions into the law, instead of adhering to a plain and intelligible rule. As I have always thought that it would have been better never to have considered knowledge as equivalent to notice, I cannot consent to carry the law one step further."

Nor will the known insolvency or bankruptcy of the acceptor dispense with notice. *Russell* v. *Langstaffe* (*h*), *Warrington* v. *Furbor* (*i*), *Nicholson* v. *Gouthit* (*k*), *Rohde* v. *Proctor* (*l*), *Smith* v. *Beckett* (*m*), *Thackray* v. *Blackett.* (*n*) If there be any expectation that the bill will be paid, notice cannot be dispensed with. *Orr* v. *Maginnis* (*o*), *Legge* v. *Thorpe* (*p*), *Bucker* v. *Hiller.* (*q*) And if the party sued have any remedy over, though not on the bill, he is entitled to notice. *Brown* v. *Maffey.* (*r*)

Taddy Serjt. shewed cause, and relied on *Bickerdike* v. *Bollman* (*s*), where it was established that a drawer is

(*a*) 1 *Esp.* 332.
(*b*) 3 *B.* & *P.* 239.
(*c*) 2 *B.* & *P.* 277.
(*d*) 11 *East*, 117.
(*e*) 1 *T. R.* 167.
(*g*) 3 *B.* & *A.* 622.
(*h*) *Dougl.* 515.
(*i*) 8 *East*, 242.
(*k*) 2 *H. Bl.* 610.
(*l*) 4 *B.* & *C.* 517.
(*m*) 13 *East*, 187.
(*n*) 3 *Campb.* 164.
(*o*) 7 *East*, 358.
(*p*) 12 *East*, 171.
(*q*) 3 *Campb.* 217. 16 *East*, 43.
(*r*) 15 *East*, 216.
(*s*) 1 *T. R.* 405.

1830.

LAFITTE v. SLATTER.

not entitled to notice where he has no effects in the hands of the drawee, because he cannot be injured by want of notice: and the Court will not look beyond the parties to the bill. The circumstance, therefore, of the drawer expecting the bill to be paid by a stranger, or having any remedy over against him, will not of itself entitle him to notice. In *Brown* v. *Maffey* and *Cory* v. *Scott*, the expectation of payment and the remedy over were confined to parties to the bill.

Taddy then contended, that the letter of the Plaintiff's attorney was equivalent to notice of dishonour; but the Court decided at once that it was clearly insufficient.

Wilde in support of his rule, (*Russell* Serjt. was with him,) observed, that the decision in *Bickerdike* v. *Bollman* had always been disapproved of, and could not be supported except under circumstances precisely the same. It was distinguishable from the present case in the circumstance that the drawer had no remedy over.

TINDAL C. J. *Bickerdike* v. *Bollman* has always been considered as an excepted case; and perhaps it applies only where the bill has been accepted for the accommodation of the drawer, who, in such case, if he knew that the acceptor had no assets, can incur no damage from want of notice. The principle of that case, therefore, is not to be extended. And in many other decisions, particularly in *Rucker* v. *Hiller* (*a*) it has been laid down, that the drawer is entitled to notice if he have reasonable ground to expect the bill will be paid, although he have no assets in the acceptor's hands.

The question, therefore, is, whether as the evidence stands in this case, the drawer had reasonable grounds

(*a*) 16 *East*, 43.

to

to expect that the acceptor or some one else would pay the bill, although the drawer had no assets in the acceptor's hands; and when we find the acceptor saying he had not the means of paying the bill in consequence of *Rose*'s misconduct, it seems to have been understood that *Rose* was the person who was to take up the bill. And, as *Rose* owed the drawer 1000*l.*, he had occasion to watch the proceedings of *Rose* as well as of the acceptor, and so was exposed to injury by the want of notice.

PARK J. was absent at chambers, but his concurrence in the judgment was stated by the Chief Justice.

BOSANQUET J. (*a*) The general rule is, that the drawer is entitled to notice of the dishonour of the bill, and *Bickerdike* v. *Bollman* is an excepted case, the principle of which is not to be extended. In the case of an accommodation bill, the drawer has no reason to expect the bill will be paid unless he pays it himself; but in other cases it is established, that the drawer is entitled to notice if he have a reasonable expectation that the bill be paid. It is manifest here that the drawer lent his name in the expectation that *Rose* would provide for the bill; he was, therefore, entitled to notice of its dishonour.

Rule absolute.

(*a*) *Gaselee* J. delivered no opinion, not having been present during the argument on the part of the Plaintiff.

1830.

June 12. HAMILTON *v.* JONES, PITT, and Another.

The sheriff may, even after he is in contempt for not bringing in the body, put in bail to surrender the Defendant without the consent of the Defendant, and notwithstanding the original bail-piece is still on the file.

THE Defendants *Jones* and *Pitt* having been arrested in this cause, and the bail of which they had given notice not having justified, the sheriff was ruled to bring in the body, and the rule having expired, an attachment issued against him; when the old bail-piece being still on the file, the sheriff, without the knowledge of the Defendants, put in fresh bail for the purpose of rendering, and then rendered the Defendants.

Pitt, one of the Defendants, now objected in person to this course as irregular, contending, that as long as the old bail-piece remained on the file, the original bail were alone competent to render the Defendants, for which he referred to *Sharp* v. *Sheriff* (*a*), and contended, on the authority of *Rex* v. *Sheriff of Essex* (*b*), and many other cases, that after the attachment had issued, the sheriff could not purge his contempt except with the consent of the Defendants. *Park* J. having referred to *Evans* v. *Swete* (*c*), the Defendant *Pitt* admitted, that what he complained of had prevailed in practice, but urged that the practice was erroneous, and at variance with all the other cases.

TINDAL C. J. No case has been made out for the interference of the Court, on this ground. The Defendant complains that he has been rendered to prison by persons who are strangers to him; but it appears by his affidavit, that those persons were bail put in by the sheriff for the purpose of rendering: the question,

(*a*) 7 *T. R.* 226. (*b*) 5 *T. R.* 633. (*c*) 2 *Bingh.* 271.

there-

1830.

HAMILTON v. JONES.

therefore, is, whether the practice of this Court allows the sheriff to put in bail to protect himself, where the bail put in by the Defendant have omitted to justify. There are several cases which establish that he has the power of doing so, and in particular *Haggett* v. *Argent.* (*a*) Such has been the invariable practice, and it must be immaterial to the Defendant whether he is surrendered by one set of bail or the other.

As to the objection, that the sheriff cannot do this after he is in contempt, however it might be urged on the part of the Plaintiff, if he waives it, it is not open to the Defendant to raise such an objection; and I see no reason why the sheriff, as a public officer, should not have every indulgence to enable him to make the render.

The Defendant took nothing on this ground, but having objected that the sheriff's officer had charged him 1*l.* 8*s.* for the arrest, a rule *nisi* was granted to refer it to the prothonotary, to ascertain what the officer was entitled to.

(*a*) 7 *Taunt.* 47.

1830.

June 12. SHARP *v.* SHARP.

Testator, after bequeathing pecuniary legacies to his children, devised to his widow the *whole of his remaining property* in the Bank of *England* or otherwise, and also a freehold house in *S.*, a freehold estate in *R.*, a copyhold estate in *B.*, and a leasehold estate in *A.*, with all right and title to the same: Held, that the widow took a fee in the freehold, and a customary fee in the copyhold.

BY order of the Master of the Rolls, the following case was submitted for the opinion of this Court:—

Thomas Sharp, late of *Silver Street*, in the parish of *St. Botolph*, in the town of *Cambridge*, tailor, deceased, the late husband of the Defendant, being in his lifetime, and at the time of his death, seised in fee-simple of, or well entitled to considerable real estates, made his will, bearing date the 30th of *October* 1822; and thereby, after directing that his just debts, funeral expenses, and the charges of proving his will, should be paid and satisfied by his executrix and executors thereinafter named, and after giving several pecuniary legacies for the benefit of his children therein mentioned, proceeded in the words following, that is to say:—"I give and bequeath to my dear wife *Emilia Sharp*, the whole of my remaining property in the Bank of *England* or otherwise; and also a freehold house which I now live in, situated in *Silver Street*, in the parish of *St. Botolph*, in the town of *Cambridge*; also a freehold estate in *Regent Street*, in the parish of *St. Andrew*, in the town of *Cambridge*; also about sixty-one acres of freehold land, with house and barns thereon, situated in the fens and in the parish of *Bottisham*, in the county of *Cambridge*; also about sixteen acres of fen land, freehold, with a house and barn thereon, adjoining the above sixty-one acres of land in *Bottisham* fen; also about twelve acres of freehold fen land in the parish of *Stretham*, in the *Isle of Ely*, in the county of *Cambridge*; also a copyhold estate

1830.

SHARP v. SHARP.

estate of the manor of *Ely Barton*, and now occupied by Mr. *Benjamin Pope*, of *Stretham*, and is the estate I lately purchased of Mr. *Aswell Peacock*; also a leasehold estate purchased of the assignees of Mr. *D. Blacklee*, and which is in the parish of *St. Andrew the Less*, otherwise called *Barnwell*, in the town of *Cambridge*, with all right and title to the same. I also leave my wife all monies that should be in my possession at my decease, and all monies due to me on all mortgages, notes, or note of hand, with all interest due thereon; also all my household furniture, plate, linen, china, and glass, and all other effects. I also leave my dear wife *Emilia Sharp*, all my share of the property due to me out of the business, as carried on in the firm of Messrs. *William Sharp*, *Thomas Sharp*, and *Frederick Sharp* only; the property so belonging to my share consists of estates, freehold and leasehold messuages, bonds, notes of hand, bills and drafts, cash and monies in the banker's hands, and outstanding debts, and the stock in trade."

The testator died on the 6th *March* 1823, without revoking or altering his will, leaving the Defendant, his widow, and the Plaintiff, his eldest son and heir at law, and also his heir by the custom of the manor of *Ely Barton*, him surviving.

The estates devised by the said will consisted of the several freehold and copyhold messuages, lands, tenements, and hereditaments in the will particularly described, and the question for the opinion of the Court, was,

Whether the Defendant, *Emilia Sharp*, was entitled to an estate for her life, or to an estate in fee simple in all or any, and which of the messuages, lands, tenements, and hereditaments devised by the said will of her late husband *Thomas Sharp*, the testator?

The

1830.

SHARP v. SHARP.

The case was argued in *Easter* term.

Scriven Serjt. for the Plaintiff. The Defendant took only an estate for life. In a devise of real property, where there are no words of inheritance, and no necessary implication from the language of the will to give a larger estate, the devisee takes only a life interest. *Loveacres* v. *Blight* (*a*), *Bowes* v. *Blackett*. (*b*)

There is nothing from which such an implication can arise in the present will unless it be the word *estate*. But that word alone will not convey a fee. There must be other expressions indicating the testator's intention; *Denn* v. *Gaskin* (*c*), *Frogmorton* v. *Wright* (*d*), *Goodright d. Drewry* v. *Barron* (*e*), *Wilkinson* v. *Merryland* (*g*), *Pierson* v. *Vickers* (*h*); or a charge of debts on the freehold, as in *Denn* v. *Mellor*. (*i*) The heir is not to be disinherited unless the intention be clear. *Right* v. *Sidebotham* (*k*), *Doe d. Pulteney* v. *Cavan* (*l*), *Doe* v. *Wright* (*m*), *Roe* v. *Yeud* (*n*), *Timewell* v. *Perkins*. (*o*) The word *estate*, as used in this will, is designative of locality only, not of interest; and the words "with all right and title to the same" indicate only an intention that the enjoyment should be uninterrupted. Those words, too, apply only to the estate in *Barnwell*.

Adams Serjt. *contrà*. The Defendant took a fee in all the property, for the testator's intention to devise a fee to her is sufficiently apparent in the circumstance of his leaving pecuniary bequests to all his children, and

(*a*) *Cowp.* 355.
(*b*) *Cowp.* 240.
(*c*) *Cowp.* 657.
(*d*) 3 *Wils.* 414.
(*e*) 11 *East*, 220.
(*g*) Cited in 1 *Comyns*, 253. 339.
(*h*) 5 *East*, 547.
(*i*) 5 *T. R.* 558.
(*k*) *Dougl.* 759.
(*l*) 5 *T. R.* 567.
(*m*) 8 *T. R.* 64.
(*n*) 2 *N. R.* 214.
(*o*) 2 *Atk.* 102.

then

1830.

SHARP v. SHARP.

then giving to his wife "the whole of his remaining property," concluding the catalogue of it with the words "and all right and title to the same."

In *Andrew* v. *Southouse* (*a*) by a devise of all testator's "interest" in certain estates, a fee was holden to pass, and Lord *Kenyon* said, "For nearly half a century it has been the wish of the courts to give effect to the intention of the devisor as far as they can. It has frequently been observed that in almost every case where the words of the devise have been so restrained as to give only an estate for life, the decision has been against what may be supposed to have been the private intention of the devisor; and Lord *Mansfield* often said that it appeared to him that persons in general who made their own wills thought that the same words were sufficient to pass an estate of inheritance that are used to convey a mere chattel interest." And in *Cole* v. *Rawlinson* (*b*) a fee was holden to pass by a devise of all right and title to the property described. In *Holdfast* v. *Marten* (*c*) it was decided that the word *estates* will pass a fee unless it be restrained by other expressions in the will. In *Fletcher* v. *Smiton* (*d*) it was holden that the word *estates* in a will would carry the fee, unless coupled with other words which shew a different intention; and in *Doe* v. *Woodhouse* (*e*), that the words "the remainder of the profits out of my whole estate," after certain specific devises, carry a fee.

Scriven. In *Andrew* v. *Southouse* the testator charged with an annuity the land he had devised; it was necessary, therefore, that the devisee should take a fee to effect all the testator's intentions. In *Cole* v. *Rawlinson*

(*a*) 5 *T. R.* 292.
(*b*) 3 *Br. P. C.* 7.
(*c*) 1 *T. R.* 411.
(*d*) 2 *T. R.* 656.
(*e*) 4 *T. R.* 89.

the

1830.

SHARP v. SHARP.

the introductory parts of the will gave a key to the testator's meaning.

Cur. adv. vult.

The following certificate was afterwards sent: —

We have heard this case argued by counsel, and have considered the same; and we are of opinion that *Emilia Sharp* is entitled to an estate in fee simple in all the freehold messuages, lands, tenements, and hereditaments devised by the said will of her late husband *Thomas Sharp*, the testator; and to an estate in fee, according to the custom of the manor of *Ely Barton*, in the copyhold estate devised by the said will.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
J. B. BOSANQUET.

June 15.

ROWE *v.* SOFTLY.

When money is paid into the hands of the sheriff in lieu of bail, the Defendant has, under 7 & 8 *G.* 4. *c.* 71., till the day for *perfecting* special bail for giving notice of his intention that the money shall remain in court to abide the event of the suit.

THE Defendant was arrested on the 8th of *May*, when he placed in the sheriffs' hands, in lieu of bail, 21*l.*, the debt sought to be recovered, and 10*l.* for costs, pursuant to 7 & 8 *G.* 4. *c.* 71. *s.* 2.; which sums were afterwards paid into the hands of the prothonotary.

On the 14th, the Defendant's time for putting in bail expired, and none appeared. On the 17th, the Plaintiff obtained a rule for taking out of court the two sums in the hands of the prothonotary, no bail having been put in; and,

On the same day, before which the Defendant was not compellable to perfect his bail, he gave the Plaintiff notice of his intention to allow the two sums, and 10*l.*

more

more which he added, to remain in court pursuant to the statute to abide the event of the suit, and that he had entered a common appearance.

Adams Serjt. shewed cause against the rule for taking the money out of Court, and contended, that as the Defendant himself, if he had perfected special bail, could not have taken the money out till the bail were perfected, the Plaintiff could not claim it at an earlier period; the Plaintiff, therefore, was not in a situation to make the present motion till the 18th, and the Defendant had the right of giving notice of his intention till the expiration of the 17th. The act was remedial; intended to extend the provisions of 43 *G.* 3. *c.* 46.; and ought to receive a liberal construction. Besides, it contained no provision enabling the Plaintiff to take the money out of Court before judgment.

Andrews Serjt., in support of the rule, insisted that the Plaintiff was entitled to the money, upon the Defendant's failure to put in bail; and that the Defendant was not entitled to postpone notice of his intention till the day for perfecting bail.

The *Court* took time to enquire into the practice of the Court of King's Bench; and now

TINDAL C. J. pronounced judgment. In this cause the Plaintiff seeks to take out of Court a sum of 21*l.*, being the debt sought to be recovered, and 10*l.* beyond, paid by the Defendant into the hands of the sheriff in lieu of his giving bail to the sheriff upon his arrest.

The question arises on the statute 7 & 8 *G.* 4. *c.* 71. *s.* 2., which extends the provisions of the 43 *G.* 3. *c.* 46., and enacts, "that it shall be lawful for the defendant, instead of putting in and perfecting special bail in the action

1830.
ROWE
v.
SOPTLY.

action according to the course and practice of the court, to allow the sum deposited with the sheriff, and by him paid into court, together with the additional sum of 10*l.* to be paid into court by such defendant as a further security for the costs of the action, to remain in the court to abide the event of the suit:" — "and thereupon the defendant may, and is required to enter a common appearance, or file common bail in the action within such time as he would have been required to have put in and perfected special bail in the action according to the course of the court." And the point to be determined is, whether on the day for *perfecting* special bail the Defendant was in time for giving notice of his intention that the sums paid into the hands of the sheriff should remain in court to abide the event of the cause, or whether he ought to have given that notice on or before the day for *putting in* the bail.

The act is remedial; it extends the provisions of the 43 *G.* 3. *c.* 46., which had been found beneficial in its operation, and the words used, "Within such time as he would have been required to have put in and perfected special bail in the action, according to the course of the court," comprehend the whole time till the last day for perfecting special bail. And we put this construction on it the rather, because it has no tendency to delay the Plaintiff, for he could not declare in chief till the time for perfecting special bail had expired. It has been contended that there is no provision in the act which authorizes the Plaintiff to take the money out of court before the suit is concluded. At all events the Defendant had till the end of the 17th to perfect special bail; and as he gave notice on that day of his intention that the money should remain in court to abide the event of the suit, he is entitled to proceed with his defence.

Rule discharged.

1830.

SMITH and Others, Assignees of COOKE, *v.* CAMPBELL, SHOULS, and COOPER.

June 15.

Where there are several Defendants who obtain a verdict generally, the costs of all must be taxed at the same time, although they defend separately.

THIS was an action of *assumpsit*. *Cooper* defended separately. The Plaintiffs countermanded notice of trial: before they gave a second notice, *Cooper* became insolvent, and the two first Defendants only appeared to defend the cause at the trial.

A verdict was given for the Defendants generally, and costs were taxed for the two Defendants who appeared at the trial, *Cooper*'s attorney declaring he would not be concerned for him. Judgment was signed, and the costs paid.

Wilde Serjt. obtained a rule *nisi* for the prothonotary to review his taxation, and allow *Cooper* his costs.

Taddy Serjt., who shewed cause, contended that judgment having been once signed against the Plaintiffs, and the costs having been paid, they ought not to be harassed again. The Defendants must arrange between themselves the division of what had been paid.

Wilde. The third Defendant ought not to lose his costs because he happened not to be present when the costs were taxed; especially as judgment was signed in order to prevent any delay to the other Defendants.

TINDAL C. J. The Defendant *Cooper* had the opportunity of obtaining his costs, if he had chosen to exert himself, when the judgment was signed and the costs

1830.

SMITH v. CAMPBELL.

costs paid to his Co-defendants; but he has no right to prejudice the Plaintiffs by a second demand. The ground of complaint, if any where, is by *Cooper* against his own attorney.

Rule discharged.

June 16.

WELSH *v.* ROSE.

Plaintiff being about to take an apartment of Defendant's tenant, Defendant promised Plaintiff never to trouble him or his property so long as he paid the tenant the rent of the apartment.

The Plaintiff paid the rent up to a certain period, and had made a tender of the residue remaining due, when the Defendant, who had received no notice of the tender, distrained Plaintiff's goods for rent due from the tenant to Defendant: Held, that his right to distrain was not barred.

TRESPASS for breaking and entering the Plaintiff's rooms, &c. and taking his goods.

Plea. That one *John Barrett* for a long time, to wit, for the space of one year next before and on the 25th day of *November* 1829, and from thence until and at the said times when, &c. held and enjoyed, amongst other premises, the said rooms and apartments, pig-stye and yard, in which, &c. as tenant thereof to the said Defendant, under and by virtue of a certain demise thereof theretofore made, at and under a yearly rent of 18*l.* payable monthly, that is to say, on the 25th day of each and every month in the year, by even and equal portions: that on the said 25th day of *November*, in the year aforesaid, a large sum of money, to wit, the sum of 10*l.* 10*s.* of the rent aforesaid, for seven months ending on the said 25th day of *November*, became and was due and payable from the said *J. Barrett* to the said Defendant, and at the said times, when, &c. was in arrear and unpaid: wherefore the said Defendant on the said day when, &c. did enter into and upon the said rooms, apartments, pig-stye, and yard, in which, &c. and took, &c.

Replication.

1830.

WELSH v. ROSE.

Replication. That before and at the time of the application to the Defendant, and his giving the assurance and making the promise hereinafter next mentioned, the said *J. Barrett* held and enjoyed certain premises, with the appurtenances, as tenant thereof to the Defendant; and that the said rooms and apartments, and yard, in which, &c. were part and parcel of the said premises, so held and enjoyed by the said *J. Barrett* as tenant thereof to the Defendant: that the Plaintiff, being minded and desirous to take and hire the said rooms and apartments, and yard, in which, &c. of the said *J. Barrett*, and to become tenant thereof to the said *J. Barrett*, at and under a certain rent theretofore payable by the Plaintiff to the said *J. Barrett* for the same, but being apprehensive that the said *J. Barrett* then was or might thereafter become indebted to the Defendant for the rent of the whole of the premises with the appurtenances, — whereof the said rooms and apartments, and yard, in which, &c. and which the Plaintiff was so minded and desirous to hire and take of the said *J. Barrett*, were parts and parcel as aforesaid, — and that if the said *J. Barrett* was or should become indebted to the Defendant for rent as aforesaid, the cattle, goods, and chattels of him, the Plaintiff, which he might bring into and upon the rooms and apartments, and yard, in which, &c. if he hired and took the same of the said *J. Barrett*, might be seized and taken by the Defendant as a distress for any rent which might be or might become due and in arrear from the said *J. Barrett* to the Defendant for rent of the whole of the premises so held by the said *J. Barrett* as tenant thereof to the Defendant as aforesaid, and being unwilling to expose such his cattle, goods, and chattels to be taken as a distress for such rent as last aforesaid, or to become tenant to the said *J. Barrett*, without being assured and satisfied that such his cattle, goods, and chattels would not be

1830.

WELSH v. ROSE.

taken as a distress for such rent as last aforesaid, before he took and hired the said rooms and apartments, and yard, in which, &c. and before the said time, when, &c. to wit, on the 25th day of *May* 1829, to wit, at, &c. applied to the Defendant as the landlord of the said *J. Barrett* of the whole of the said premises whereof the said rooms and apartments, and yard, in which, &c. were parts and parcel as aforesaid, and informed him that he was minded and desirous to hire and take the said rooms and apartments, and yard, in which, &c. of the said *J. Barrett*, but was unwilling to do so if he were liable, or his cattle, goods, and chattels could be taken as a distress for the rent of the said *J. Barrett* to the Defendant; whereupon the Defendant then and there, and before he, the Plaintiff, took or hired the said rooms and apartments, and yard, of the said *J. Barrett*, and long before the said time, when, &c. to wit, on, &c. at, &c. assured and promised the Plaintiff that as long as he, the Plaintiff, paid to the said *J. Barrett* the rent which should become due from him to the said *J. Barrett* for the said rooms and apartments, and yard, which he was so minded and desirous to hire and take of the said *J. Barrett* as aforesaid, and which were and are the rooms and apartments, and yard, in which, &c. he the Defendant would never trouble the Plaintiff or his property: that he, the Plaintiff, relying on and confiding in the said assurance and promise of the Defendant so with him made as aforesaid, did afterwards, and long before the said time, when, &c. to wit, on, &c. at, &c. hire and take the said rooms and apartments, and yard, in which, &c. so being parts and parcel as aforesaid, of the said *J. Barrett*, and became and at the said time, when, &c. was tenant to the said *J. Barrett* of the same, and after he so became and whilst he was tenant to the said *J. Barrett* of the same, and before the said time, when, &c. to wit, on the day and year last aforesaid, with the consent

sent of the said *J. Barrett*, erected and made the said pig-sty in the said yard, in which, &c.: that he, further relying on the said assurance and promises of the Defendant, afterwards, and long before the said time, when, &c. to wit, on, &c. brought the said cattle, goods, and chattels in the declaration mentioned, being his proper cattle, goods, and chattels, into and upon the said rooms and apartments, and yard, in which, &c.: that before the said time, when, &c. and before the making the tender hereinafter mentioned, he had paid to the said *J. Barrett* all the rent which had become due and payable from him to the said *J. Barrett* for or in respect of the said rooms and apartments, and yard, in which, &c. before the said time, when, &c. except a small sum of money, to wit, the sum of 2*l.* 15*s.* of lawful money of *Great Britain*; and that always from the time the said sum of 2*l.* 15*s.* of rent aforesaid, or any part thereof, became and was due and payable from and by the Plaintiff to the said *J. Barrett*, hitherto, he was and still is ready and willing to have paid and to pay the same to the said *J. Barrett*; and that he, before the said time, when, &c. to wit, on, &c. at, &c. was ready and willing to have paid, and then and there tendered to pay, to the said *J. Barrett* the said sum of 2*l.* 15*s.* as aforesaid, to receive which of the Plaintiff the said *J. Barrett* wholly refused: and further, that at the said time, when, &c. there was not any other or more rent due or payable from him, the Plaintiff, to the said *J. Barrett* than the said sum of 2*l.* 15*s.* so tendered and offered, and so refused as aforesaid: that he was and remained in the quiet and peaceable possession, use, occupation, and enjoyment of the said rooms and apartments, pig-sty and yard, in which, &c. as tenant thereof to the said *J. Barrett*, and that the said cattle, goods, and chattels in the declaration mentioned, being the proper cattle, goods, and chattels of him, the Plaintiff, were in and

1830.

WELSH v. ROSE.

upon the said rooms and apartments, pig-sty and yard, in which, &c. until the Defendant at the said time, when, &c. of his own wrong, and in breach of his said assurance and promise, did and committed the trespasses in the declaration mentioned, and in and by his said last plea attempted to be justified, in manner and form as the Plaintiff above thereof complained against him.

Demurrer and joinder.

E. Lawes Serjt., in support of the demurrer. The matter replied does not amount to a release of the right to distrain. It is not pleaded as a contract, and does not appear to be such, there being an entire absence of consideration. But, at all events, it is a conditional contract, and there is no averment that the condition has been observed. The engagement was not to trouble the Plaintiff if *Barrett*'s rent were regularly paid, and to enable the Plaintiff to sue, it ought to appear that the rent has been regularly paid. It is not alleged even that the Defendant had notice of the tender.

Taddy Serjt., *contrà*. The statement in the replication amounts to a licence to Plaintiff to put his goods on the premises without being subject to distress; and in *Webb* v. *Paternoster* (*a*), confirmed by *Tayler* v. *Waters* (*b*), it was held, that a licence to stack hay upon land, was irrevocable, provided the licence were for a time certain. The time here is the duration of *Barrett*'s term. As to the payment of the rent, the performance of that condition is shewn in substance, and the licence being executed, the consideration for it is immaterial.

TINDAL C. J. In the case cited, the argument turned on a licence granted by one who was competent to

(*a*) *Palm.* 71. (*b*) 7 *Taunt.* 374.

grant

1830.
WELSH
v.
ROSE.

grant it. But there was no licence here from the Defendant, because he had parted with the possession of the premises to *Barrett*. The matter replied, therefore, is no more than a promise not to trouble the Plaintiff as long as he paid to *Barrett* the rent which should become due from the Plaintiff to *Barrett*. Without entering into the question, whether or not there was a consideration to support this promise, it is enough to observe here, that the condition of the promise has not been observed. "So long as he paid to *Barrett* the rent which should become due, the Defendant would never trouble the Plaintiff or his property."

Here it is stated that the rent was only paid to a certain period, and that some remains due. As to the tender which is alleged, it does not appear that the landlord had any notice of it, and he is not to be deprived of his remedy by distress, by a proceeding of which he had no notice.

PARK J. This was a mere conditional undertaking, and unless performance of the condition be shewn, there is no relinquishment of the Defendant's right of distress.

GASELEE J. Without entering into the effect of the agreement, it is sufficient to say, that the condition on which it hinged has not been performed, and that, therefore, the Plaintiff can claim no advantage under it.

BOSANQUET J. I am of the same opinion. *Webb* v. *Paternoster* does not apply, because the licence there was given by a party in possession, and competent to give it. Here the supposed licence was not given till the Defendant had parted with the possession of the premises.

Judgment for the Defendant.

1830.

(IN THE EXCHEQUER CHAMBER.)

June 18. EASTERBY *v.* SAMPSON and Another.

Where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor, and the owners of the other two thirds, for pulling down an old smelting mill, and building another of larger dimensions, upon a waste near the mines, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it: Held, that such a covenant was to be implied, and that the lessor of the one third might sue upon it in respect of his interest.

COVENANT. The declaration recited that Sir *C. Turner*, before and at the time of making the indenture of demise thereinafter mentioned, was seised in fee of and in one undivided third part of the tenements, with the appurtenances thereinafter mentioned to have been demised: and the said Sir *C. T.* being so seised, &c. &c. by a certain indenture of demise made between Sir *C. T.* of the one part, and *A. S.*, *J. S.*, *G. D.*, the Defendant, *W. H.*, and *F. H.* of the other part, (reciting that Sir *C. T.* did, on, &c. agree with the said *A. S.*, &c. to demise to them for twenty-one years the undivided third part of Sir *C. T.* of and in the mines, minerals, and quarries thereinafter described, at and under the yearly rent of, &c. and under and subject to the covenants and agreements thereinafter contained; that the said *A. S.*, *J. S.*, *G. D.*, the Defendant, *W. H.*, and *F. H.* did, in pursuance of the said agreement between them and the said Sir *C. T.*, enter upon and take possession

The lease contained a demise of all mines and minerals then opened or discovered, or which might during the term be opened or discovered, in or under certain moors and waste lands; and also all smelting mills then standing upon the said lands, with full liberty to sink shafts there, and to build thereon any mills or other buildings requisite for working the mines, *habendum* the said demised premises, with the appurtenances for twenty-one years. The lessor afterwards granted his reversion of and in the said demised premises, with the appurtenances, to *G. B.*, who, by will, devised the same to the Plaintiffs: Held, that the covenant to build the new smelting mill tended to the support and maintenance of the thing demised, and that the assignee of the reversion might therefore sue upon it.

of

of the said third part and premises on the 1st of *January* 1800; that *A. S.*, *J. S.*, *G. D.*, the Defendant, *W. H.*, and *F. H.*, had since the said 1st of *January* 1800, with the permission of Sir *C. T.*, and of *W. S.* Esq., and *C. F. F.* Esq., the owners of the other two third parts of the said mines and premises, taken down a smelting mill belonging to them, situate upon part of a tract of waste ground within the manor of *Arkindale* thereinafter mentioned, called *Old Moulds*, and some other contiguous buildings; and the said *A. S.*, *J. S.*, *G. D.*, the Defendant, *W. H.*, and *F. H.*, did engage to erect, at their own expense, a smelting mill of larger dimensions, with several adjoining buildings upon another part of the said tract of waste ground; which mill, with the water wheel belonging thereto, and the said other buildings, it had been agreed should belong to and be the property of the said Sir *C. T.*, *W. S.*, and *C. F. F.*, in lieu of the said mill and buildings so taken down;) in consideration of the rent therein reserved, and of the covenants and agreements thereinafter contained, did demise to *A. S.*, *J. S.*, *G. D.*, the Defendant, *W. H.*, and *F. H.*, their executors, &c. all that undivided third part or share of the said Sir *C. T.* of and in all and singular the mines, veins, pipes, floats, strings, and parcels of lead, tin, and copper ore, and other minerals and fossils of what nature or kind soever, which were then known, found, or discovered, or which should, during the continuance of that demise, be opened, known, found, discovered, or gotten, in, within, upon, from, or under all the moors, commons, wastes, and unenclosed lands situate, lying, or being in, within, or parcel of the several manors or lordships of *Arkindale*, *New Forest*, and *Hope*, in the county of *York*, or any of them; and also of and in all mines and seams of coal, and quarries of stone, in or within the said manors or lordships, or reputed manors or

1830.

EASTERBY v. SAMPSON.

lordships, or any of them, or any part thereof respectively; and also of and in all smelting mills, stamping mills, refining mills, store-houses, work-houses, smiths' forges, sheds, hovels, and buildings standing or being in or upon any part of the said moors, commons, or wastes which then were, or at any time theretofore had been commonly used or employed for mining purposes, together with full and free liberty to *A. S.*, *J. S.*, *G. D.*, the Defendant, *W. H.*, and *F. H.*, their executors, &c. during the continuance of the demise, to dig, sink, drive, work, and make grooves, &c. and to use all other lawful ways and means whatsoever, (hushing, in any lands or grounds lying within the said manors, or any of them, and which, on the day of the date of the said indenture, were enclosed, only excepted, unless the same should be done with the licence and consent in writing of the lords of the said manors for the time being,) for the searching for, finding, discovering, working, and getting of the lead, tin, and copper ore, and coal, and all other minerals, and for working the said quarries, and burning lime in or upon all or any of the moors, commons, wastes, and unenclosed lands, situate, &c.; and with full power (but so far only as the said Sir *C.* could lawfully grant the same, and not otherwise,) for *A. S.*, *J. S.*, *G. D.*, the Defendant, *W. H.*, and *F. H.*, their executors, &c., to have heap-room, &c. upon the said moors, commons, wastes, and unenclosed lands, for laying, placing, &c. the ores, &c. wrought and dug out of the mines and quarries, of which one third part was thereinbefore demised, and with full power (so far as, &c.) to turn and to dig watercourses, &c. to do all other things (hushing only excepted) as might be necessary; and also full power and authority to erect or build in or upon any part of the said moors, commons, wastes, and lands, then unenclosed, all such smelting mills, stamping mills,

1830.

EASTERBY v. SAMPSON.

mills, &c. as might be requisite for effectually working the said mines. *Habendum* to *A. S.*, *J. S.*, *G. D.*, the Defendant, and *J. H.* and *F. H.*, for nineteen years. And the Defendant did, in and by the said indenture, for himself and his heirs, &c., covenant, promise, and agree to and with the said Sir *C.*, his heirs, &c., that the said *A. S.*, *J. S.*, *G. D.*, the Defendant, *W. H.*, and *F. H.*, their executors, administrators, and assigns, should and would, during the continuance of the said demise, maintain, preserve, and keep the said smelting mill engaged to be erected and built by them, with the waterwheel to the same belonging, and the bobbies, ore-houses, and other houses, bingsteads, sheds, and other buildings already erected, and which, during the continuance of that demise, should be erected contiguous or near to the said mill, in good and sufficient condition and repair, and should at the expiration, or other sooner determination, of the said term, deliver up the same in good and sufficient condition and repair, and also deliver up in good and sufficient order and repair all such forges, &c., as should within two years of the end of the term be used by the lessees for mining purposes. The declaration then stated a grant of the reversion of Sir *C. T.* of and in the said demised premises, with the appurtenances, to *G. B.*; that *G. B.* devised the same to the Plaintiff, and died seised of the said reversion, without altering his will. Breach, first, that neither Defendant nor *A. S.*, &c. did at any time during the demise erect or build at their own expence, or otherwise, a smelting mill of larger dimensions than the mill taken down, as in the indenture of demise mentioned. Secondly, that the Defendant and his co-lessees did not keep such smelting mill, &c. in good repair. Thirdly, that they did not so deliver it up at the expiration of the term. Demurrer and joinder. Judgment

1830.

EASTERBY v. SAMPSON.

ment for the Plaintiff in the court below; and error thereon.

Broderick for the Defendant below.

There is no covenant by the Defendant below to erect a smelting mill; and if there be such a covenant, it is not one on which the assignee of the reversion can sue.

There is no such covenant expressed, and it cannot be implied, because the contract set out is incompatible with such implication: *expressum facit cessare tacitum.* The express contract recited between Sir *C. Turner*, the Defendant, and five others for the erection of the smelting mill, is incompatible with any implied covenant to that effect on the part of the Defendant alone; and *Saltoun* v. *Houstoun* (*a*), which was relied on in the court below, is distinguishable, because in that case there was no express contract incompatible with the contract implied.

But if any covenant can be implied, the Plaintiff is not entitled to sue on it. It is not a covenant that runs with the land or binds the assignee of the covenantor, and the case falls within the principle of the first and second resolution in *Spencer*'s case (*b*): "When the covenant extends to a thing *in esse* parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words: but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and ex-

(*a*) 1 *Bingh.* 433. (*b*) 5 *Rep.* 17.

tends

tends to the support of the thing demised, and, therefore, is *quodammodo* annexed appurtenant to houses, and shall bind the assignee, although he be not bound expressly by the covenant: but in the case at bar, the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be newly built after, and, therefore, shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being. And it was resolved that in this case, if the lessee had covenanted for him and his assigns, that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and, therefore, shall bind the assignee by express words. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor, which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and, therefore, in such case the assignee of the thing demised cannot be charged with it no more than any other stranger."

The mill was not *in esse* at the time of the demise; the waste on which it was to be built was not demised; and the mill was no more necessarily connected with the mines than a corn mill with the cultivation and growth of corn. Nor, if it had been built, could the Plaintiff singly

1830.

EASTERBY v. SAMPSON.

singly have had any right to it. In *Vyvyan* v. *Arthur* (*a*), and *Vernon* v. *Smith* (*b*), the subject in dispute was clearly attached to the property demised.

Alderson, *contrà*, was stopped by the Court.

ALEXANDER C. B. (*c*) Two points have been raised in this case. First, whether there be any covenant on the part of the Defendant below to erect a smelting mill; and, secondly, whether such a covenant, if it exist, runs with the land. And, first, we are all of opinion that in this demise there is a distinct covenant on the part of the Defendant below to erect a smelting mill. Any words in a deed which shew an agreement to do a thing amount to a covenant; *Com. Dig. Covenant*; and here it is recited, that the Defendant and others had, with the permission of Sir *C. Turner* and two others, taken down a smelting mill, and did engage to erect at their own expense a smelting mill of larger dimensions; which mill it had been agreed should belong to Sir *C. Turner* and the two others in lieu of the mill so taken down. And then Sir *C. Turner* demises "all that undivided third part or share of the said Sir *C. Turner* of and in all and singular the mines, veins, pipes, floats, strings, and parcels of lead, tin and copper ore, and other minerals and fossils of what nature or kind soever, which were then known, found, or discovered, or gotten, in, within, upon, from, or under all the moors, commons, wastes, and unenclosed lands, situate, lying, or being in, within, or parcel of the several manors or lordships of *Arkindale*, *New Forest*, and *Hope*, in the county of *York*, or any of them; and also of and in all mines and seams of

(*a*) 1 *B.* & *C.* 410. (*b*) 5 *B.* & *A.* 1.
(*c*) *Tindal* C. J. was absent.

coal,

coal, and quarries of stone, in or within the said manors or lordships, or reputed manors or lordships, or any of them, or any part thereof respectively; and also of and in all smelting mills, stamping mills, refining mills, store-houses, workhouses, smiths' forges, sheds, hovels, and buildings standing or being in or upon any part of the said moors, commons, or wastes, which then were, or at any time theretofore had been commonly used or employed for mining purposes: and with full power (but so far only as Sir *C. Turner* could lawfully grant the same, and not otherwise,) for *A. S.*, *J. S.*, *G. D.*, the Defendant, *W. H.*, and *F. H.*, their executors, &c. to have heap-room, &c. upon the said moors, commons, wastes, and unenclosed lands, for laying, placing, &c. the ores, &c. wrought and dug out of the mines and quarries, of which one third was thereinbefore demised, and with full power (so far as, &c.) to turn and to dig water-courses, &c. to do all other things (hushing only excepted) as might be necessary; and also full power and authority to erect or build in or upon any part of the said moors, commons, wastes, and lands then unenclosed, all such smelting mills, stamping mills, &c. as might be requisite for effectually working the said mines: *Habendum*, to *A. S.*, *J. S.*, *G. D.*, the Defendant, *W. H.*, and *F. H.*, for nineteen years: and the Defendant did in and by the said indenture, for himself and his heirs, &c. covenant, promise, and agree to and with the said Sir *C. Turner*, his heirs, &c. that the said *A. S.*, *J. S.*, *G. D.*, the Defendant, *W. H.*, and *F. H.*, their executors, administrators, and assigns, should and would during the continuance of the said demise, maintain, preserve, and keep the said smelting mill engaged to be erected and built by them, with the waterwheel to the same belonging, and the bobbies, ore-houses, and other houses, bingsteads, sheds, and other buildings already

1830.

EASTERBY v. SAMPSON.

already erected, and which during the continuance of that demise should be erected contiguous or near to the said mill, in good and sufficient condition and repair, and should at the expiration or other sooner determination of the said term deliver up the same in good and sufficient condition and repair."

On this we think it clear that there is a covenant binding the Defendant and his assigns, and that the assigns of Sir *C. Turner* are entitled to the benefit of it.

Spencer's case lays down the rule, that if the lessee covenant for him and his assigns to do any thing on the land demised, it will bind the assignee though the covenant should extend to a thing to be newly made. And in the *Mayor of Congleton* v. *Pattison* (*a*), Lord *Ellenborough* says, "A covenant in which the assignee is specifically named, though it were for a thing not *in esse* at the time, yet being specifically named, it would bind him, if it affected the nature, quality, or value of the thing demised, independently of collateral circumstances; or *if it affected the mode of enjoying it.*" That is the rule to be extracted from *Spencer*'s case and from all which have followed it.

Much of the argument here has turned on the assertion that there is no connection between the smelting mill and the mines; but the demise is of mines, and of "smelting mills, stamping mills, refining mills, storehouses, workhouses, forges, sheds, hovels, and buildings standing or being upon any of the said commons, moors, or wastes, with full power to have heap-room upon the said moors, &c. for laying and placing the ores dug out of the mines;" and it is impossible to doubt that the demise of the mines is immediately connected with the possession of the smelting mill. The

(*a*) 10 *East*, 135.

case,

case, therefore, falls within the principle laid down by Lord *Ellenborough* in the decision referred to, and this was an interest running with the land.

It has been urged, indeed, that we cannot imply a covenant by the Defendant alone where there is an express agreement by the Defendant and others touching the same subject-matter. But the agreement is several as well as joint, and, therefore, the judgment by the court below must be affirmed.

Judgment affirmed.

WILLIAMS *v.* PAUL.

June 19.

THE Plaintiff's drover being on a journey from *Sussex* to *Wales* with sundry beasts belonging to his master, sold three cows and a heifer to the Defendant, in order to procure funds to proceed on his journey. The bargain was made, and the price (to be paid in three months) agreed on, on a *Saturday* evening, subject to the Defendant's approval of the beasts upon inspection the next morning. Accordingly, on *Sunday* the Defendant inspected and approved the beasts. The drover proceeded on his journey, leaving behind the three cows, and a heifer, which the Defendant alleged was not the one he had chosen, and ultimately refused to pay for; but the four beasts remained with him. Some time afterwards the Defendant, being applied to by the drover for the price, said he would settle when the time agreed on was up.

The Defendant kept a heifer which he had bought of a drover on *Sunday*, and afterwards made a promise to pay for:

Held, that having kept the beast he was liable, at all events, on the *quantum meruit*, notwithstanding the contract made on *Sunday*.

The heifer, however, remaining unpaid for, this action was commenced for the price. *Bayley* J., before whom the cause was tried, thought the Defendant having kept the

1830.

WILLIAMS v. PAUL.

the beast, and subsequently promised to pay, was liable for the value upon a *quantum meruit*, though not for the price agreed on by the bargain completed on *Sunday*.

A verdict having been found for the Plaintiff,

Andrews Serjt. obtained a rule *nisi* to set it aside and enter a nonsuit, on the ground that the contract was void under 29 *Car.* 2. *c.* 7., being a contract made in the Plaintiff's ordinary vocation, and completed on *Sunday*.

Bompas Serjt. shewed cause. This contract was made on *Saturday*, and the mere inspection of the cattle on *Sunday* did not render it void, otherwise the statute would become the instrument of gross injustice if the Defendant be permitted to keep the beast without paying for it. But, at all events, the Defendant having retained the beast, and having afterwards promised to pay for it, is liable upon the new promise. In *Bloxsome* v. *Williams* (*a*), *Fennell* v. *Ridler* (*b*), and *Smith* v. *Sparrow* (*c*), the contract was clearly made on *Sunday*, and there was no subsequent promise.

Andrews. This falls within the principle of all the preceding cases, and if the Defendant be held liable on a *quantum meruit* because he retains the beast, a mode is pointed out by which the statute may be eluded in all cases.

PARK J. (*d*) I should be sorry to be supposed to recede from the cases decided on this point, and the principle established to enforce the observance of the Lord's day, which tends so eminently to the advantage

(*a*) 3 *B.* & *C.* 232.
(*b*) 5 *B.* & *C.* 406.
(*c*) 4 *Bingh.* 84.
(*d*) *Tindal* C. J. was absent.

of

1830.

WILLIAMS v. PAUL.

of society, since no laws can be of avail except in so far as they are founded on religion.

I think that the contract in this case was made on *Sunday*, because the bargain on *Saturday* was incomplete, and came to no conclusion till the Defendant had inspected the cattle on *Sunday*.

However, we hold the Defendant liable on the ground taken by the learned Judge at the trial, although we regret to be obliged to come to this conclusion, because it may have a tendency to defeat the statute. But here it appears that the Defendant not only retained the animal, but made a new promise to pay subsequently to the *Sunday*, and his present refusal is not consistent with the practice of a very sincere Christian.

GASELEE J. I am of opinion that this contract was made on *Sunday*, but what passed afterwards is sufficient to sustain the verdict. The subsequent promise was sufficient on the *quantum meruit*, or as a ratification of the agreement of *Saturday*.

BOSANQUET J. I am of the same opinion, and think the ground taken by the learned Judge at the trial correct. The original contract was on *Sunday*; but the thing sold was left in the possession of the Defendant. Some time afterwards he promised to pay; and the jury having found the value, there is no ground for impeaching the verdict.

Rule discharged.

1830.

June 19. ROE dem. DURANT *v.* MOORE.

Surety recognizance in ejectment pursuant to 1 *G.* 4. *c.* 87. how entitled.

IN this case the tenant having been admitted to defend instead of the casual ejector, put in sureties to abide the result of the cause pursuant to the statute 1 *G.* 4. *c.* 87. See *ante*, p. 574. And upon an objection taken by *Wilde* Serjt., it was ordered that the recognizance of sureties should be taken in the cause entitled as above, and not in the cause as originally entitled, *Roe d. Durant* v. *Doe*, *Moore* tenant; because it would be in the cause entitled as above that the lessor of the Plaintiff, if successful, would have his claim on the sureties.

These sureties appeared to be the first taken since the statute in either court.

June 14. ADAMS *v.* GIBNEY, sued with ELIZABETH MARIA PEYTON, Executor of J. R. PEYTON.

Tenant for life, remainder over, by indenture demises to lessee, his executors, &c., for fifteen years, without any express covenant for quiet enjoyment; lessee is evicted by remainder-man after death of tenant for life, and before expiration of the fifteen years: Held, that lessee cannot maintain covenant against executor of tenant for life.

THE declaration stated, that, on the 20th of *November* 1821, by indenture between *J. R. Peyton* of the one part, and the Plaintiff of the other part, after reciting that the Plaintiff had agreed with *J. R. Peyton* for a lease of *Wakehurst Park* for the term of fifteen years from *March* then last past, subject to the covenants therein-

after

after contained, it was witnessed, that for and in consideration of the rent, covenants, and agreements thereinafter contained, *J. R. Peyton* had demised certain premises to the Plaintiff, containing 500 acres, &c. (subject to certain exceptions and reservations;) *Habendum* from the 25th of *March* 1821 for fifteen years at the rent of 40*l.* per annum, clear of all taxes except poors' rates; which poors' rates were to be paid by *J. R. Peyton*, his executors, or administrators, or such other person or persons as should for the time being be entitled to the reversion and inheritance of the said premises;

And the Plaintiff for himself, his executors, administrators, and assigns, did thereby covenant, promise, and agree to and with the said *J. R. Peyton*, and to and with all and every such person and persons as should for the time being be entitled to the reversion and inheritance of the said premises, or any part thereof, in manner and form following; that is to say, that the Plaintiff, his executors, administrators, or assigns should and would from time to time, and at all times during the continuance of the term thereby demised, well and truly pay, or cause to be paid unto the said *J. R. Peyton*, his heirs, executors, or administrators, or to such other person or persons as aforesaid, the said yearly rent of 40*l.* of lawful current money as aforesaid upon the several days and times, and in the manner thereinbefore mentioned: he also covenanted not to cut down, lop, top, stub up, or destroy any of the trees thereinbefore excepted, or else to pay the sum of 20*l.* per load for trees so lopped, &c. to the said *J. R. Peyton*, or such person or persons as aforesaid: a new fence was to be made all round the park, at the joint expense of both lessor and tenant; and *J. R. Peyton* was to put the messuage on the premises into good and tenantable repair: the said fence, building, and messuage was to be thenceforth kept in

1830.

ADAMS v. GIBNEY.

repair by the Plaintiff, and *J. R. Peyton* was to provide thirty new rabbit hutches for the use of the Plaintiff: and it was covenanted that it should and might be lawful for the Plaintiff, his executors, administrators, or assigns, at any time or times during the continuance of the term thereby demised, to cut down the underwood that might be standing and growing on the demised premises, at such age as he or they should think fit, and take and carry away the same for his and their own use and benefit; and also that he, the said *J. R. Peyton*, his heirs, executors, or administrators, or such other person or persons as aforesaid, should and would, at the end, expiration, or other sooner determination of the said demise and lease, pay the Plaintiff, his executors, administrators or assigns, for the underwood then standing and growing on the demised premises down to the stem, and also for the stock of rabbits that might then be thereon, as the same should be valued and appraised by two indifferent persons, one to be chosen by each party, and in case they could not agree, by a third person to be appointed by them for an umpire, whose valuation and appraisement should be final and conclusive, and the amount thereof be paid by the said *J. R. Peyton*, his heirs, executors, or administrators to the Plaintiff, his executors, administrators, or assigns.

The Plaintiff entered the 20th of *November* 1821, and averred, that he well and truly performed all things on his part contained in the said indenture.

Breach — That before and at the time of the making the said indenture, and from thence until and at the time of the death of the said *J. R. Peyton*, he, the said *J. R. Peyton* was only seised of the demised premises in his demesne as of freehold for the term of his natural life, and was not by law empowered, authorized, or entitled to grant or demise to the Plaintiff the demised premises

premises for the said term of fifteen years in manner aforesaid, or for any period beyond the term of the life of the said *J. R. Peyton*, so as to bind the person entitled to the freehold of the demised premises, upon the death of the said *J. R. Peyton*, or to render such term and lease obligatory upon such person: that whilst the Plaintiff was possessed of the said term by the said indenture granted, to wit, on the 1st of *April* 1825, the said *J. R. Peyton* died, to wit, at, &c. and thereupon the said term ended and was determined and became void, and one *Joseph John Wakehurst Peyton* then and there became and was entitled to the freehold and inheritance of the demised premises and the possession thereof, and laid claim to and demanded of the Plaintiff the immediate possession of the said premises in breach of the said indenture: that thereupon, afterwards, to wit, in *Trinity* term in the seventh year of the reign of our lord the now king, a certain action of ejectment was commenced and prosecuted by and on the behalf of the said *J. J. W. Peyton*, wherein *John Doe* was the nominal Plaintiff, against the said now Plaintiff *Thomas Adams*, for the recovery of the possession of the premises so demised by the said indenture: That, on the 2d of *December* 1826, notice was given to *J. R. Peyton*'s executors that the now Plaintiff would hold them responsible for all damages, costs, losses, or expenses he might sustain or incur by reason of the said action, in the event of the Plaintiff therein succeeding in such action, or the said *Thomas* being interrupted in the possession or enjoyment of the said tenements, or any part thereof, or evicted therefrom during the remainder of the said term of fifteen years under or by virtue of the said ejectment, or by reason of any defect of title or inability of the said *J. R. Peyton* to grant the said lease to the said *Thomas* as aforesaid: that the Defendants refused to

1830.

ADAMS v. GIBNEY.

settle such action of ejectment: that the now Plaintiff accordingly defended the said action, being ignorant whether *J. J. W. Peyton* had or not full right and title to the premises: that in *Easter* term 1827 judgment was recovered in the said action of ejectment; whereupon the now Plaintiff was forced to deliver, and did deliver up the possession of the premises to *J. J. W. Peyton*: that the now Plaintiff sustained damage thereby for loss of the enjoyment of the premises, and also did, on the 26th *May* 1827, pay the damages and costs sustained in the said action of ejectment, amounting to the sum of 189*l.*; also his own costs of defending the said action: that in *Hilary* term 1828, an action of trespass was brought by *J. J. W. Peyton* for mesne profits, and on the 22d *February* 1828, the now Plaintiff gave the now Defendants, as executrix and executors, notice of such action: that in *Hilary* term 1829 the costs and damages recovered in the last-mentioned action were 477*l.*, and that the now Plaintiff's own costs incurred in the said last-mentioned action were 200*l.*: that on the 15th *February* 1827, a bill in Chancery was filed by *J. J. W. Peyton* to restrain the commission of waste, and an injunction obtained; and that Plaintiff was hindered and prevented from cutting the underwood by reason of the lease being determined.

Second breach, — That there was a large quantity of underwood and stock of rabbits on the premises, which underwood and rabbits the now Plaintiff resigned on the premises; and that he was always ready to appoint a proper person to value the underwood and rabbits, and on the 2d *December* 1826 gave notice to that effect, but that Defendant refused to concur.

There were various pleas, which the Plaintiff replied to; and the Defendant having demurred to the replication,

cation, upon the argument, in *Easter* term, excepted to the sufficiency of the above declaration.

Scriven Serjt. in support of the demurrer. The action does not lie. Where there is no express covenant for quiet enjoyment, a covenant to that effect may in general be implied from the lessor's taking on himself to demise: *Nokes*'s case (*a*): and the lessee, or his representatives, will be liable on such a covenant, if it be violated during the term by himself or persons claiming through him: *Stile* v. *Herring* (*b*); or if he have no title, and the lessee cannot lawfully enter. But if he have title to devise in the first instance, although the term be liable to be determined on an event over which the lessor has no control, the word demise will not amount to a covenant for quiet enjoyment absolutely, but merely to a warranty that the lessee shall enjoy the term as far as concerns the lessor and persons claiming through him, and independently of the collateral event over which the lessor has no control. If the lessee require an indemnity against such collateral event, he must insist on an express covenant for quiet enjoyment.

The covenant in law, giving a right to damages for eviction, ceased with the estate which passed by the demise, and determined with the death of the lessor.

In *Swan* v. *Searles* (*c*), it was expressly decided that this action is not maintainable against the representatives of the lessor, if the term ends by a collateral determination; *ex. gr.*, his death; or against himself, if it ends by the death of a *cestui que vie*, before eviction.

In *Stile* v. *Herring*, and the cases which decide that the action is maintainable where there is not any right in the lessor to make any demise, and the lessee does

(*a*) 4 *Rep.* 81. (*b*) *Cro. Jac.* 73. 1 *Roll. Abr.* 520.
(*c*) *Dyer*, 257 *b.* 1 *Leon.* 179. *Owen*, 105.

1830.
ADAMS
v.
GIBNEY.

not and cannot lawfully enter, the estate has not, by law, any collateral determination. It is by law a lease between the parties for certain years absolutely, and an eviction at any time during those years is a breach of the covenant, because it is an eviction while the term is, as between the parties, continuing. But in the present case, as in *Swan* v. *Searles*, and in *Bragg* v. *Wiseman* (*a*), the lease has in point of law a collateral determination; the term ceases by death, and with the term ceases the covenant or warranty for enjoyment, which the law raises from the word *demise*.

As the lessee is by the determination of the lease discharged from the payment of rent and other services, so the lessor is, by the collateral determination, discharged from his warranty or covenant for quiet enjoyment. The rights and remedies are reciprocal. In *Owen*, 105. one of the reasons assigned against the claim of the lessee is, that the lessee is not termor at the time of the disturbance, in effect, because his estate is determined before the disturbance, by the death of the tenant for life, &c.

The same principle is established in *Hyde* v. *The Canons of Windsor* (*b*); is recognized in *Shepherd's Touchstone*, 165. 178., and the following authorities:—*Fitz. N. B.* 145, 146. and note; *Year Book* 32 *H.* 6. fol. 32.; *Com. Dig. Cov.* (F); *Bac. Abr. Leases, Covenant* (E); *Vin. Abr. Cov.* (D); 2 *Bl. Com.* 304.; *Cheiny* v. *Langley* (*c*), *Andrews's* case (*d*), *Procter* v. *Johnson*. (*e*) The passage in *Co. Lit.* 389. *a*, which states that there can be no warranty of chattels, real or personal, seems to conflict with the other authorities, but is clearly outweighed by them.

(*a*) 1 *Brownl.* 22.
(*b*) *Cro. El.* 553.
(*c*) 1 *Leon.* 179. *Cro. El.* 157.
(*d*) 2 *Leon.* 104. *Cro. El.* 214.
(*e*) 2 *Brownl.* 213.

Bompas

1830.

ADAMS v. GIBNEY.

Bompas Serjt., *contrà*. First, a covenant and not a mere warranty is to be implied from the word *demise*; and, secondly, an express covenant for quiet enjoyment may be collected from the whole of this contract.

A warranty doth not extend to any lease, though it be for many thousand years, or any other chattel, but only to freehold or inheritances: *Co. Lit.* 389. *a*. And a covenant is not confined to any technical form of expression; it results from the whole object of the contract between the parties; *Com. Dig. Cov.* (A) 2. *Holder* v. *Taylor* (*a*); and when the lessor here says he *has* demised, the expression implies that he has the power to do so, and to secure to the lessee an enjoyment co-extensive with the term: otherwise he imposes on the lessee, and obtains a consideration for that which he cannot make good.

In *Burnett* v. *Lynch* (*b*), *Littledale* J. says, "An action of covenant will lie by the lessee against the lessor upon the word '*demise*' in the lease; that word imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term; and, therefore, if the lessee be ousted during the term, an action of covenant will lie by him against the lessor." And in *Iggulden* v. *May* (*c*), *Eldon* C. says, "There is a covenant for quiet enjoyment under the words 'granted and demised:' a covenant for payment of rent under the words 'yielding and paying:' and other covenants under other general words in this lease. In a court of law, generally, the construction ought to be as to both the express and implied covenants: more peculiarly, where there is but one express covenant; and upon the ordinary sense, it is supposed to mean express

(*a*) *Hob.* 12. (*b*) 5 *B. & C.* 609 (*c*) 9 *Ves.* 325.

covenants

1830.

ADAMS v. GIBNEY.

covenants only. It was settled so long ago as the time of *Siderfin*, that where a bond is given, generally for performance of covenants in a lease, it extends to protect breaches of implied, as well as express, covenants; and if rent is not paid, or there is an eviction, the bond is forfeited for breach of the two implied covenants I have mentioned."

All the cases referred to in support of the demurrer rest on *Cheiny* v. *Langley*, which is no authority for the propositions to which the subsequent decisions have extended; for in *Cheiny* v. *Langley*, the defendant only sold his interest, such as it was, without assuming to convey any other definite interest to the purchaser. *Bragg* v. *Wiseman*, therefore, cannot be law, if it rest for support solely on *Cheiny* v. *Langley*. In *Swan* v. *Searles*, as appears from the pleadings set out in *Bendloe* 138., the action was brought, not for damages, but for the term itself, which having been determined, could not be recovered: and that case has been doubted. *Vin. Abr. Covenant* (D). *Wentw. Executor*, 126. *Roll. Abr.* 82. *a.* In *Andrews*'s case, and *Procter* v. *Johnson*, the action was also brought to recover the term. And the passage in *Fitz. N. B.* 145, 146. may be explained by distributing the covenant according to the subject matter to which it applies, *reddendo singula singulis.*

But, secondly, here is a recital of an agreement for a lease for fifteen years, and that agreement amounts to a covenant sufficiently express to support this action. In order to ascertain the covenants to which the parties have rendered themselves liable, the recital in an indenture is as operative as any other part. 3 *Keble*, 465. [*Park* J. Lord *Kenyon* reprimanded me when I was at the bar for citing *Keble.*] *Severn* v. *Clerke.* (*a*)

(*a*) 1 *Leon.* 122.

Scriven.

1830.

ADAMS v. GIBNEY.

Scriven. A recital in a deed containing express covenants cannot be set up as an express covenant in itself, contrary to the intention to be collected from the operative part of the deed; and therefore it comes round to the same question, whether a covenant for quiet enjoyment can in this case be implied from the word *demise*. *Holder* v. *Taylor* does not apply, for the action was brought in respect of a disturbance by the covenantor himself. And the *dicta* which have been cited are applicable only to cases of that description. There is no hardship in the present case, for the lessee is discharged from his obligations under the lease, and it was his business to have exacted an express covenant, if he proposed an indemnity for the loss of any portion of the fifteen years. *Caveat Emptor.* He could scarcely, however, have been ignorant of his situation, for his covenants are not with the lessor, his heirs and executors, but with the party interested for the time being.

Cur. adv. vult.

TINDAL C. J. The question in this case arises upon a demurrer to the replication to one of the pleas of the Defendant, which plea is pleaded to the breach of covenant firstly assigned in the declaration, that is, to a breach of covenant for quiet enjoyment; and as the Defendant insists that it appears on the record that no action is maintainable against him as executor on such supposed breach, it becomes unnecessary to consider any of the pleadings subsequent to the declaration.

The question, therefore, becomes this: tenant for life, remainder over, by indenture demises to the lessee, his executors, &c. for the term of fifteen years, without any express covenant for quiet enjoyment; the lessee is evicted by the remainder-man, after the death of tenant for life, but before the expiration of the fifteen years: whether

1830.

ADAMS. v. GIBNEY.

whether the lessee can maintain an action of covenant against the executor of tenant for life in respect of such eviction?

That the word *demise* in a lease for years imports and makes a covenant in law for quiet enjoyment by the lessee, at least during the continuance of the estate out of which the lease is granted, is clear from all the authorities, and is admitted by the Defendant; but it is contended on his part, that such implied covenant ceases with his estate, as well upon the ground that it is rather in the nature of an implied warranty than an implied covenant, as upon the direct authority of decided cases.

If it had been necessary to determine this case upon the ground of distinction above referred to, considerable doubt would be thrown upon such distinction in the case of a chattel real, by the authority of *Co. Litt.* 389. *a*, where it is laid down "That a warranty cannot be annexed to chattels real or personal,—but if a man warrant them, the party shall have covenant." We think, however, it is sufficient to say, that the cases which have been decided on the precise point now raised, are too strong to get over. Such is the case in *Dyer* 257. *a*, determined in *Michaelmas* term 8 & 9 *Eliz.* The lease in that case, as in the present, was by indenture made by tenant for life, by the word *demise*. The ouster in that case, as in this, was by the remainderman after the death of the tenant for life, and before the effluxion of the term. The action in that case also, as in this, was an action against the executors of the lessor, to recover damages for the breach of covenant. (See the form of the declaration in *Bendloe's Rep.* 150.) And after two argnments it was held in that case by three of the justices, "That the executors should not be charged by this covenant in law—because the covenant

nant in law ends and determines with the estate and interest of the lessor;" also, "That no cause of action is given against the testator in his lifetime." And, although one of the justices differed from the rest, yet he admitted, if the lease had been by deed-poll instead of by indenture, he should have agreed with his companions: a distinction which is not assented to by the learned reporter.

The same principle is laid down in *Hyde* v. *The Canons of Windsor*, and in the case of *Bragg* v. *Wiseman*, where covenant is brought against the executor of the husband upon a lease by husband and wife, and it is laid down "That a covenant in law shall not be extended to make one do more than he can, which was to warrant it as long as he lived, and no longer."

Unless, therefore, some very strong and insuperable objection had been raised to the principle of those decisions, which has not been done in the present case, we think it safer to adhere to them, the doctrine of which appears to have been adopted in books of high authority; amongst others see *Shepherd's Touchstone*, 160., and *Com. Dig. Covenant* (C). And no injustice can be occasioned to the lessee by this decision, who must have known, from the form of the reservation in the lease, that his lessor was no more than a tenant for life, but was contented to accept a lease without an express covenant for quiet enjoyment.

It remains only to notice one argument urged by the Plaintiff; namely, that although the action may not be maintainable upon the covenant to be implied from the word *demise*, yet that there is a recital of an agreement for a lease for fifteen years, and that such agreement would of itself be a sufficient express covenant to support the action. But the recital is not of an agreement for a lease for fifteen years absolutely, but for a lease

1830.

ADAMS v. GIBNEY.

lease for fifteen years "subject to the covenants hereinafter contained." So that the demise by the indenture, is the completion and performance of that agreement, and the question still turns upon the lease itself, whether the lease contains such ground of action as is contended for.

Upon the whole, therefore, we think there must be judgment for the Defendant as to so much of the declaration as is covered by the plea demurred to.

Judgment for Defendant accordingly.

June 17.

WORMWELL *v.* HAILSTONE.

In an action against the clerk of the trustees of a turnpike road, under a statute which permits the trustees to sue and be sued in the name of their clerk, execution cannot issue against the clerk personally.

THIS was an action against *Samuel Hailstone*, clerk to trustees acting under and by virtue of the statute made and passed in the sixth year of the reign of our lord the king, for repairing, widening, improving, and maintaining in repair the turnpike roads from *Leeds* to *Halifax*, and the several branches and roads therein mentioned in the West Riding of the county of *York*, that is to say, the trustees appointed for the *Thornton* district of road in the said act mentioned: and the first count of the declaration stated that the said *trustees* were indebted to the Plaintiff in the sum of 800*l.* for work and labour, and materials found; and, being so indebted, promised to pay. A verdict having been given for the Plaintiff, the *postea* was entered up as follows: —

Afterwards, that is to say, on the day and at the place within contained, before the Honorable Sir *James Allan Park*, knight, one of his majesty's justices assigned

assigned to hold pleas in the Court of our lord the king of the Bench, and the Honorable Sir *James Parke*, knight, one of his majesty's justices assigned to hold pleas in the court of our lord the king, before the king himself, and justices of our said lord the king assigned to hold the assizes in and for the county of *York*, according to the form of the statute in such case made and provided, come as well the within-named Plaintiff as the within-named Defendant, by their respective attornies within mentioned; and the jurors of the jury whereof mention within is made, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried, and sworn, say, upon their oath, that the *trustees* within mentioned did undertake and promise in manner and form as the said Plaintiff hath within complained against the said Defendant, and they assess the damages of the said Plaintiff on occasion thereof, over and above his costs and charges by him about his suit in this behalf expended, to 448*l.* 9*s.*; and for those costs and charges, to forty shillings. Therefore, &c.

Judgment was hereon signed against the Defendant, upon which a *fi. fa.* issued, following the terms of the judgment, and the sheriff, conformably with the *fi. fa.*, issued his warrant to his bailiffs, commanding that they, some or one of them, should omit not by reason of any liberty within his county, but that they should enter the same, and cause to be levied of the goods and chattels in his bailiwick of *Samuel Hailstone*, clerk to the trustees acting under and by virtue of the statute made and passed in the sixth year of the reign of our Lord the now King, for repairing, widening, improving, and maintaining in repair the turnpike roads from *Leeds* to *Halifax*, and the several branches and roads therein mentioned in the West Riding of the county of *York*, that is to say, the

1830.

WORMWELL v. HAILSTONE.

the trustees appointed for the *Thornton* district of road in the said act mentioned, the sum of 525*l.* 14*s.*, which in his said Majesty's court, before his said Majesty's justices at *Westminster*, were awarded to *James Wormwell* for his damages which he had sustained, as well by reason of not performing certain promises and undertakings made by the said trustees to the said *James*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Samuel* was convicted, as appeared to his said Majesty of record, &c.

A levy having been made of the goods of the Defendant,

Jones Serjt. obtained a rule *nisi* to set aside the execution, on the ground that the name of the Defendant, as clerk to the trustees, was only used for convenience, and that he was not personally responsible to the Plaintiff.

By the general turnpike act, 3 *G.* 4. *c.* 126. *s.* 74. it is enacted, "That the trustees and commissioners of every turnpike road may sue and be sued in the name or names of any one of such trustees or commissioners, or of their clerk or clerks for the time being; and that no action or suit to be brought or commenced by or against any trustees or commissioners of any turnpike road by virtue of this or any act or acts of parliament in the name or names of any one such trustees or commissioners, or their clerk or clerks, shall abate and be discontinued by the death or removal of such trustee, commissioner, clerk or clerks, or any of them, without the consent of the said trustees or commissioners; but that any one of such trustees or commissioners shall always be deemed to be the plaintiff or plaintiffs, defendant or defendants (as the case may be), in every such action or suit: Provided always, that every such trustee,

trustee, commissioner, clerk or clerks, shall be reimbursed and paid, out of the monies belonging to the turnpike roads for which he or they shall act, all such costs, charges, and expenses as he or they shall be put unto or become chargeable with, or be liable to, by reason of his or their being so made plaintiff or plaintiffs, defendant or defendants."

By the 4 *G.* 4. *c.* 95. *s.* 61. it is provided, "That the trustees or commissioners for making or maintaining any turnpike road, shall not be personally subject to or liable to be charged with the payment of any sum or sums of money by reason of their having signed or executed any mortgage, or assignment by way of mortgage, or other security, to be made by virtue or in pursuance of any act for making and maintaining any turnpike road: Provided always, that in case any action, suit, or prosecution shall be brought or commenced against any trustee or commissioner for any thing done by virtue or in pursuance of the said recited act of the third year of his present Majesty, or this act, or any such act for making or maintaining any turnpike road, all the costs, charges, and expenses of defending such action, suit, or prosecution, or which such trustee or commissioner shall incur in consequence thereof, shall be defrayed out of the toll arising on the turnpike road for which such trustee or commissioner shall act."

By 7 & 8 *G.* 4. *c.* 24. *s.* 2. it is enacted, "That every trustee who shall order or direct the expenditure of any money for or towards the making, repairing, or altering any road not comprehended within the act in the execution of which he may be acting, or for or towards the performance of any act, matter, or thing not authorized by such act or the said recited acts, shall be personally liable to the trust for the repayment of the money so expended at the suit of any person, or any one trustee, or of the clerk to such trustee on behalf of

1830.

WORMWELL v. HAILSTONE.

such trust, and that all the costs and charges of such suit, over and above any costs and charges recovered from the Defendant in such suit, shall be paid and borne by such trust." And by the third section, it is enacted, "That no trustee shall be personally subject or liable to be charged (except as next hereinbefore mentioned), with the payment of any sum or sums of money laid out or expended in or towards the making, repairing, or altering any turnpike road, nor shall execution issue out against the goods and chattels of any trustee, by reason of his having acted as such trustee, or having signed or authorized, or directed any contract or security to be entered into relating to any such road, unless in such contract or security such trustee shall have, in express words, rendered himself so personally liable."

By a local act, 6 *G.* 4. *c.* 149., intituled, "An Act for repairing, widening, improving, and maintaining in repair the turnpike roads from *Leeds* to *Halifax*, and the several branches and roads therein mentioned in the West Riding of the county of *York*," the usual powers are given to the trustees therein mentioned for making the roads and branches therein described, and amongst others, the *Thornton* district of road: and creditors are enabled to have access to the books of the trustees.

Taking all these acts together, it appears that the clerk of the trustees is only the formal plaintiff or defendant, in actions by or against trustees, like the fictitious parties in the action of ejectment. It is plain from the declaration in this case, that the trustees are the real Defendants. The object of the section, which enables creditors to sue the clerk, was to prevent the inconvenience and difficulty of suing the trustees, a numerous and fluctuating body; it never was intended to make the clerk personally responsible, when the trustees are personally exempted, but that the remedy of creditors should be against the fund of the road: as by

1830.

WORMWELL v. HAILSTONE.

by a *mandamus* to the trustees; or otherwise. Great inconvenience would be experienced in making the clerk personally liable; as if he were to die after judgment and before execution, could execution issue against his executor, who might not be clerk, or his successor, who would be no party to the record? The local act, 6 *G.* 4. *c.* 149. *ss.* 25. 27., enables creditors to have access to the books of the trustees, which shews that the legislature intended their remedy should be on the funds of the road.

Wilde Serjt. shewed cause. The creditor is permitted by the act 3 *G.* 4. *c.* 126. to make the clerk Defendant, and there is nothing in the act to exempt him from the incidents attaching to a defendant in any other suit. It is because the trustees are personally exempted that it becomes necessary to make the clerk personally responsible; in which there is great convenience to creditors, and neither inconvenience nor injustice to the clerk: the creditors having a single assignable individual to apply to, who, by his influence with the trustees, is likely to obtain payment of the demand; and the clerk being entitled under the act to be reimbursed all his expenses, by the trustees: for the word *expenses* must, in common parlance, be taken to cover debt and damages. The execution must pursue the form of the judgment; the judgment here is against the clerk, and would be fruitless if he be not liable to execution. In the riot act, statutes of hue and cry, dock acts and others, there are explicit directions as to the mode of obtaining the fruits of a judgment. In the absence of any such directions here, it must be presumed the law is to take its usual course. The statute says, the clerk shall *always* be deemed to be defendant; if so, he must be defendant for the purposes of execution as well as for the purpose of

1830.

WORMWELL v. HAILSTONE.

appearance. As to any technical difficulty in case of his death, the plaintiff is not to be deprived of his remedy where the clerk is alive, because the legislature may not have anticipated or provided for difficulties in case of his death. But in the spirit of the enactment, which enables a creditor to make him a defendant in the first instance, the Court might, upon his death, permit the plaintiff to enter a suggestion, and issue a *scire facias* against his successor.

Jones was heard in support of his rule; and in addition to the arguments urged before, observed on the hardship of the clerk's being sent to gaol for a debt from which his principals were exempt from execution, and the absence of any clause in the acts to reimburse him for any thing but costs and expenses, which, he contended, did not cover damages.

The *Court* took time to look into the local act, and now their decision was pronounced by

TINDAL C. J. This is an application to the Court to set aside the writ of *fi. fa.* which has been issued upon the judgment obtained against the Defendant, on the ground that the statute 3 *G.* 4. *c.* 126. *s.* 74., which enables the Plaintiff to sue the Defendant as clerk to the trustees of the turnpike road does not authorize any execution againt either the person or the property of the Defendant.

The clause in question appears to have been introduced, from the difficulty, or indeed impracticability, of carrying to a successful result any action, either by or against the whole of the very numerous and fluctuating body of which the trustees of a turnpike road generally consist. The clause, therefore, empowers, but does not compel,

compel, the trustees to sue or be sued in the name or names of any one of such trustees, or of their clerk or clerks for the time being, leaving it open to any creditor, if he shall think proper, to sue by the ordinary course of proceeding against any number of the trustees personally, where the nature of the transaction, or the form of the security or contract, gives any ground of action against those particular and individual trustees.

In the latter case, the action would have been attended with the ordinary consequences of personal liability on the part of the Defendant, had not a later statute, the 7 & 8 *G.* 4. *c.* 24. *s.* 3., taken away the personal liability of the trustees in every case, unless where the trustees have in the contract or security in express words rendered themselves personally liable.

A provision of this nature releasing the trustees from liability when the action is brought against them, although they may be the very parties to the contract or security on which the action is brought, affords a strong presumption that it could not be intended the clerk to the trustees should be personally liable, when the creditor sues the trustees in the name of their clerk. It would be very singular that the creditor of the trustees should have his election to satisfy his demand either out of the trust funds or the personal means of the clerk of the trustees, according to the form of the action he thought proper to bring.

But we think, under the proper construction of the seventy-fourth section, the clerk is not personally liable to the consequences of an action. The power to sue the trustees in the name of their clerk is, in other words, the power to make him the *nominal* defendant: the enactment that the suit shall not abate by the death or removal of the clerk, but that the clerk for the time being shall always be deemed to be the Defendant,

1830.

WORMWELL v. HAILSTONE.

points again to the same distinction between a real and nominal Defendant; and, indeed, it would open the door to inextricable confusion and difficulty if the clerk for the time being were personally to be looked to for satisfaction of the judgment. Suppose the clerk, in whose name the action was defended, to die, or be removed after judgment and before satisfaction, it would seem very unreasonable that his successor, who was no party to the defence, should be liable to pay the whole; or, on the other hand, that the executors of the former clerk, who have no concern whatever with the trust funds, should be liable to the demand out of the testator's assets.

But the main ground upon which we collect the intention of the legislature is this: the only provision for reimbursement of the clerk is a reimbursement of all the costs, charges, and expenses which he has been put to by reason of being made Defendant.

The ordinary meaning of these words will not comprehend the debt or damages recovered, and this must give at the same time the measure of the clerk's personal liability; for it cannot be supposed that he is liable to either the debt or damages recovered, where there is no express provision for repaying himself.

It is asked, How are the debt or damages to be recovered in this action if the clerk is not liable? This act, undoubtedly, makes no direct provision, as many others of a similar nature do, upon this subject. See the *West India* Dock Act, 39 *G.* 3. *c.* 69. *s.* 184., and the *London* Dock Act, 39 & 40 *G.* 3. *c.* 4. *s.* 150. But there can be no doubt but that the funds of the trustees may be made answerable for the amount ascertained in the action, in case of a refusal to apply them, either by a *mandamus* or a bill in equity. It is sufficient, however, for the present application to decide, that we think the

act

act does not authorise a personal execution against the clerk, and therefore we make a rule, not for setting aside this writ of execution, but for restraining the sheriff from executing it against the personal effects of the clerk.

1830.

WORMWELL v. HAILSTONE.

STRANGE *v.* WIGNEY.

June 15.

TROVER for a bank post bill for 100*l.* In *September* 1829, the Plaintiff came to *London* from *Tonbridge*, on the outside of a coach. She put a 100*l.* bank post bill, indorsed in blank, in her reticule, which she carried on her arm. When the *Tonbridge* coach arrived in *Bridge Street, Blackfriars*, she got into a hackney-coach, and proceeded to *Smithfield*. She was then handed out by a gentleman, to whom she had previously entrusted the reticule containing the bill. The gentleman had placed the reticule on the seat in the hackney-coach, where it was accidentally left, although a trunk which she had also with her was safely taken out. The Plaintiff, on ascertaining her loss, made enquiries about the hackney-coach without success: but she was told at the hackney-coach office, where she applied, that she need not take any steps, as the reticule would probably be returned in a few days. Notwithstanding this, she dispersed about the hackney-coach stands and watering houses a number of bills, describing her loss, and offering a reward for the recovery of her property. She also advertised her loss in a *London* newspaper called *The Morning Advertiser*, on the 24th of *September*, about eight days after

Plaintiff left in a hackney-coach in *London*, and lost, her reticule, containing a 100*l.* bank post bill, indorsed in blank; she issued handbills proclaiming her loss. Defendant, a banker at *Brighton*, who had never heard of the loss, cashed the bill for a stranger eight days afterwards. The stranger, on being asked his name, said he was on a journey, and wrote on the bill a fictitious address in an illiterate hand.

The Defendant did not enquire at what inn he was staying: Held, that the Defendant was liable for the amount to the Plaintiff.

1830.

STRANGE v. WIGNEY.

after the reticule was lost. Early on the 24th a stranger presented the bill at the banking-house of the Defendant, in *Brighton*, to be cashed. He said he was going to *Southampton*, and wrote on the bill, in a very illiterate hand, the name and address of Mr. *W. Wilson*, 16. *Queen-Street*, *Lincoln's Inn Fields*. The Defendant, not having heard of the Plaintiff's loss, cashed the bill, and took the usual commission. *Tindal* C. J., before whom the cause was tried, *Guildhall* sittings after last *Michaelmas* term, left it to the jury to consider whether there had been originally a want of ordinary care on the part of the Plaintiff, or a want of diligence in publishing her loss, or negligence in the Defendant upon the occasion of cashing the bill.

The jury having found for the Plaintiff,

Taddy Serjt. moved for a new trial.

If the banker be holden liable in this case the decision will go farther than any which have preceded it, and materially tend to paralyse the circulation of paper currency. The Plaintiff had taken no efficient means to make her loss known to the commercial world, or to guard against loss in the first instance. It was through the carelessness of her agent that the reticule containing the bill was left in the hackney-coach: the reticule was an unfit place of deposit; and there was great want of caution in indorsing the bill in blank, and enabling it to be transferred as money. Even if there had been a want of caution on the part of the Defendant, the Plaintiff has no ground of complaint: the mischief being attributable to her own previous neglect she is not entitled to repair it at the expense of the Defendant. But there was no want of caution in the Defendant. He had never heard of the Plaintiff's loss. The bill carried its title with it, and was transferable

ferable as money; *Miller* v. *Race* (*a*), *Grant* v. *Vaughan* (*b*), *Lawson* v. *Weston* (*c*); and the Defendant could not, consistently with the practice of bankers, or without giving offence to customers, pursue enquiry further than to ask the name and address of the party presenting the bill. In *Gill* v. *Cubitt* (*d*), *Abbott* C. J. said, the question was, whether the defendant took the bill under circumstances which would excite the suspicion of a prudent man. That cannot be predicated of the conduct of the Defendant in this case. *Brighton* is the resort of many opulent persons, and a place of frequent departure for the Continent; and there is nothing unusual in sojourners or travellers at such a place proposing to change a 100*l.* bill. In *Snow* v. *Sadler* (*e*) the bill was taken at *Doncaster* races, which are stated in the report to be a frequent resort of suspicious characters. In *Snow* v. *Peacock* (*g*) the amount of the bill was 500*l.*, and it was changed at a branch bank in an obscure village, not likely to be visited by persons possessed of so much property. But in *Beckwith* v. *Corral* (*h*), in an action by the owner of a lost bill of exchange against a banker who had cashed it to a stranger, it was held that the jury were properly directed to consider whether the plaintiff had used due diligence in apprizing the public of his loss, and whether the defendant had acted with good faith and sufficient caution in the receipt of the bill.

TINDAL C. J. If there had been any complaint of the manner in which the points were left by me to the jury, I should have been anxious for a re-consideration of the case. But no objection having been made to

(*a*) 1 *Burr.* 452.
(*b*) 3 *Burr.* 1516.
(*c*) 4 *Esp.* 56.
(*d*) 3 *B. & C.* 466.
(*e*) 3 *Bingh.* 610.
(*g*) 3 *Bingh.* 406.
(*h*) 3 *Bingh.* 444.

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1830.

STRANGE v. WIGNEY.

my summing up, I am averse to granting the rule. I left three points to the jury. The first was, as to the mode in which the Plaintiff had conveyed her property to *London*. It was urged by the counsel for the Defendant, that there had been a want of caution on the part of the Plaintiff in carrying in a reticule a bill of such amount, and that her negligence ought not to cast a loss upon the Defendant. It was said, that it would have been safer to have placed the note in the trunk, and, looking to the event, that might have been so. In the outset, however, I do not think that there would have been a greater degree of safety in putting the note in the trunk, as the reticule was attached to the Plaintiff, and a trunk might become the object of depredation. I left this fact, and the question, whether there had been any particular want of caution in the Plaintiff's confiding the reticule to her friend on stepping from the coach, to the consideration of the jury. If they were of opinion that there was no want of caution on the part of the Plaintiff, they were then to proceed to the second point, whether there had been any want of diligence in making her loss known. It has been said that the Plaintiff did not advertise her loss sufficiently. But there is no law requiring any precise mode of proceeding in that respect, and it would be a great hardship if such a law existed. The jury are to look to the circumstances of the case, and the degree of care which has been taken. It appeared that the Plaintiff had applied to the hackney-coach office respecting her loss, and there she had been informed that she need not make any stir for some days, as in all probability her property would be restored during that time. Notwithstanding this, the Plaintiff on the same day issued hand-bills describing her loss. The jury were of opinion that want of diligence was not imputable to the Plaintiff; and they then went on to the third point, whether there had been any want of caution

caution on the part of the Defendant. It has been urged by the Defendant's counsel that it is impossible to make enquiries of persons who present notes without giving offence. I am of a different opinion, and think that individuals who become possessed of notes in an honest way would be pleased at the praiseworthy endeavours of bankers to prevent imposition and robberies. The Defendant made no enquiry as to the inn at which the stranger was staying, nor did he call for any reference to persons in the town. Besides this, the writing of the stranger was calculated to raise suspicion, being of a character far inferior to that of a person accustomed to possess such notes. The Defendant should not have been satisfied with the bare assertion of the stranger with regard to his address and business, but should have enquired at least at what inn he was staying. I am therefore of opinion, that there is no ground for granting a new trial.

1830.

STRANGE v. WIGNEY.

PARK J. The three questions were properly left to the jury, and I see no reason for thinking their verdict wrong.

As to the first question, it is impossible to prescribe in what precise mode bills of value shall be conveyed: they are liable to be lost wherever they may be kept; and it can scarcely be objected to the Plaintiff, that during the journey the property was even attached to her person.

But the two latter questions were the main points in the case; and when we find the Plaintiff resorting to the hackney-coach office, and immediately distributing hand-bills, notwithstanding she had the sanction of that office for waiting, we cannot impute to her any want of diligence in making known her loss. If, then, there was no neglect on her part, was there any on the part

1830.

STRANGE v. WIGNEY.

part of the Defendant? I agree that 100*l.* is not a large sum for persons in a certain station to negotiate at a frequented watering-place. But the banker should at least have enquired where the stranger who presented the bill was staying, especially when his handwriting appeared to be that of an illiterate person. It was doing very little to require no more than a statement of his name and address; he should at least have been asked at what inn he was staying, and whether there was any one in the town to whom he was known.

GASELEE J. The case was properly left to the consideration of the jury, and I see no reason for disturbing the verdict.

BOSANQUET J. I am of opinion the verdict ought not to be disturbed. No objection has been made, or could have been made, to the direction of my Lord Chief Justice; and I am not prepared to say, even if there be some want of caution in the loser of property, that he is to be therefore precluded from recovering it where there has been negligence on the part of the person who receives it. Here the application made by the Plaintiff to the hackney-coach office and the distribution of the hand-bills were sufficient diligence in making her loss known; and the want of caution in the Defendant was left to the jury, who have formed the proper conclusion.

Rule refused.

See *Miller* v. *Race* (*a*), *Grant* v. *Vaughan* (*b*), *Peacock* v. *Rhodes* (*c*), *Lawson* v. *Weston* (*d*), *Solomons* v.

(*a*) 1 *Burr.* 452.
(*b*) 3 *Burr.* 1516.
(*c*) *Dougl.* 633.
(*d*) 4 *Esp.* 56.

Bank

Bank of England (*a*), *Gill* v. *Cubitt* (*b*), *Down* v. *Halling* (*c*), *Snow* v. *Peacock* (*d*), *Beckwith* v. *Corral* (*e*), and *Snow* v. *Saddler*. (*g*)

1830.

STRANGE v. WIGNEY.

(*a*) 13 *East*, 135.
(*b*) 3 *B.* & *C.* 466.
(*c*) 4 *B.* & *C.* 330.
(*d*) 3 *Bingb.* 406.
(*e*) 3 *Bingb.* 444.
(*g*) 3 *Bingb.* 610.

PARKER *v.* M'WILLIAM.

June 15.

THE Plaintiff had deposited 200*l.* in the hands of a Miss *Horsefall*, who soon afterwards died. The Defendant, who was appointed her administratrix, refused to return the 200*l.*, and this action was brought to recover it.

Where a witness remains in court after an order for the witnesses on both sides to withdraw, it rests in the discretion of the Judge, whether such witness shall be heard; except in the exchequer, where he is peremptorily excluded.

At the trial before *Tindal* C. J., *Middlesex* sittings after *Easter* term, before the counsel for the Plaintiff had opened his speech, it was arranged by both parties, that the witnesses on both sides should be sent out of court, and an order to that effect was given out loudly. After the counsel for the Plaintiff had concluded his statement of the facts of the case, which he detailed with some minuteness, the first witness for the Plaintiff, on being called, walked to the witness-box from a part of the court near the Plaintiff's counsel, where he had been standing during the whole of the speech, notwithstanding the order which had been given for all the witnesses to retire. This witness spoke to the most material fact in the case, viz. to the fact of the deposit having been made by the Plaintiff. But there were other witnesses who

1830.

PARKER v. M'WILLIAM.

who spoke to admissions of that fact by Miss *Horsefall*. The counsel for the Defendant objected to his evidence being received; and the Chief Justice then enquired of the witness if he had heard the speech: he replied immediately that he had not, and, although the question was put in a low tone, assigned as a reason, that he was hard of hearing. Upon this he was admitted to give evidence.

A verdict having been found for the Plaintiff,

Wilde Serjt. moved for a new trial, on the ground that the evidence of this witness ought to have been rejected. He referred to the *Attorney-General* v. *Bulpit* (*a*), where, in the Court of Exchequer, the evidence of a witness had been rejected under similar circumstances.

TINDAL C. J. The rule with respect to the rejection of the testimony of witnesses who have remained in court after an order for their exclusion has obtained in the Court of Exchequer for many years, and is universally known there. It was established in favour of the subject, and with a view to the fairness of proceedings chiefly at the instance of the crown. But no such inflexible rule or practice has been established in the other courts; and where an order has been made for the exclusion of witnesses, if it be disobeyed by any one of them, it must rest with the judge to ascertain whether he remained by accident, or purposed to evade the order. In the present case the witness distinctly denied having heard any part of the counsel's speech. The circumstance of his remaining in court and of his alleged capability of hearing were fully commented on

(*a*) 9 *Price*, 4.

to

1830.

PARKER v. M'WILLIAM.

to the jury, and they would apportion their credit accordingly. It did not appear that he was contumacious, or had acted with any sinister intent; and it is important to observe, that one object of the order for exclusion is to prevent the witnesses from conferring together in Court upon what they hear there. Then, we ought to examine the rest of the evidence in the cause, to ascertain the degree of importance which might have been attached to the witness in question. Here there were three other witnesses, who all agreed they had heard Miss *Horsefall* say she had received 200*l.* to keep for the Plaintiff, after declining at first to do so. I cannot say the jury would not have come to the same conclusion even if this witness had been out of the question. But, at all events, the degree of credit to which he was entitled having been fairly submitted to them, I see no reason for granting a new trial.

PARK J. Whether the rule in the Court of Exchequer be a wise one or not, I do not say, but the decision in the *Attorney-General* v. *Bulpit* turns expressly on the particular and known rule of that court; a rule which was established to exclude any imputation of unfairness in proceedings between the crown and the subject. But no such inflexible rule prevails in this Court; and though a witness may have been contumacious, that is not necessarily a ground for a new trial. There is no reason, however, for supposing that the witness here acted from contumacy. The circumstance of his remaining was commented on to the jury, and his credit duly weighed. The rejection or admission of a witness under such occasions is a question for the discretion of the Judge under all the circumstances of the case.

GASELEE

1830.

PARKER v. M'WILLIAM.

GASELEE J. This is not a case which calls on the Court to interpose. It is for the Judge at the trial to say, whether, under all the circumstances of the case, he will relax the order which has been given. And one may easily imagine cases where a witness may remain in Court accidentally, or even by the contrivance of the opposite party, in order to afford a pretence for impeaching the verdict in case it should go against them.

BOSANQUET J. As there is in this Court no such general rule as that which prevails in the Exchequer, the admission of a witness who has remained in Court notwithstanding an order for retiring, must depend on the discretion of the Judge who presides at the trial. No injustice has been done in this case, and, therefore, the rule must be refused.

Rule refused.

June 19.

SHEEN *v.* GARRETT.

A general plea of bankruptcy under the statute ought to pursue the terms of the statute, and conclude to the country.

THE Defendant pleaded to a declaration in debt on a judgment, That before the suing out of the original writ of the Plaintiff against the Defendant in this behalf, to wit, on, &c., at, &c., the Defendant became bankrupt within the true intent and meaning of the statute then and still in force concerning bankrupts; that the judgment in the declaration mentioned was obtained by the Plaintiff against the Defendant for certain debts and demands in respect of which the Plaintiff was entitled to prove by virtue of the said statute, as a creditor under a cer-

1830.

SHEEN v. GARRETT.

a certain commission of bankruptcy afterwards duly issued against the Defendant; that the aforesaid several debts and demands accrued and were due from the Defendant to the Plaintiff before and at the time when the Defendant became bankrupt as aforesaid, to wit, at, &c. And this the Defendant was ready to verify; wherefore he prayed judgment if the Plaintiff ought to have or maintain his aforesaid action thereof against him.

The Plaintiff demurred to that plea, and assigned as cause of demurrer, that the Defendant in his said plea had not averred, nor did it thereby appear, that he had ever obtained his certificate of conformity under the said commission in the said plea mentioned, according to the said statute therein mentioned; nor that the Defendant had in fact conformed himself to the same statute, whereby the said plea was insufficient according to the general rules of pleading. Also, that the Defendant had improperly concluded his said plea with a verification, and had therein otherwise departed from the form of plea allowed by the said statute, whereby the same plea was insufficient if pleaded by virtue of that statute. Also for that the said plea was uncertain, informal, insufficient, &c.

Joinder in demurrer.

Ludlow Serjt. in support of the demurrer.

The plea is ill. It is not a special plea of bankruptcy, because it does not state the trading, petitioning creditor's debt, and other particulars necessary to complete a bankruptcy; nor is it a general plea under the statute 6 *G.* 4. *c.* 16. *s.* 126., because it neither pursues the words of the statute, which are, that such bankrupt may plead in general that the cause of action accrued before he became bankrupt; nor concludes to the country, as it

1830.

SHEEN v. GARRETT.

ought to do. *Miles* v. *Williams* (*a*), *Geary* v. *Baily* (*b*), *Poole* v. *Broadfield* (*c*), *Com. Dig. Pleader*, (E) 32.

E. Lawes Serjt. *contrà*. The statute does not prescribe any particular form of words, or prohibit a conclusion with a verification. And the language of this plea is sufficient to shew it to be in substance a plea under the statute.

In *Miles* v. *Williams* the statute under which the defendant pleaded his bankruptcy was imperative that he should plead in the form there prescribed; the 6 *G.* 4. *c.* 16. enacts that he *may* so plead; and where a plea contains new allegations of fact, it ought to conclude with a verification. *Hedges* v. *Sandon.* (*d*)

PARK J. (*e*) I think this plea is ill. It has been urged that it is sufficient if in substance according to the statute, and that the Defendant is not bound to adopt the exact words of the clause. But he has not pursued the language, or given the effect, of the statute; for I cannot agree that "the cause of action," and "the aforesaid several debts and demands," are the same thing. Nor has he pleaded specially; for had he done so, he must have stated many more particulars than are stated in this plea. If the statute does not require a conclusion to the country, the practice of pleading does, as appears by all the decided cases.

GASELEE J. It is true the statute does not require a conclusion to the country; nor did the 5 *G.* 2. *c.* 30., which was in force when *Miles* v. *Williams* was decided; but it has been the uniform practice to conclude these

(*a*) 1 *P. Wms.* 249.
(*b*) *Fortesc.* 344.
(*c*) *Barnes*, 330.
(*d*) 2 *T. R.* 439.
(*e*) *Tindal* C. J. was absent.

pleas

1830.

SHEEN v. GARRETT.

pleas of bankruptcy to the country. But this is not a general plea under the statute, for it does not pursue the language of the general plea given by the statute; nor is it a special plea of bankruptcy, for want of the requisite particularity.

BOSANQUET J. I think the plea is ill. If it had been a plea under the statute it ought to have concluded to the country; for though *Hedges* v. *Sandon* shews that in certain cases a plea may conclude either with a verification or to the country, yet there are many other cases which establish that a general plea of bankruptcy must conclude to the country; and this cannot be considered a special plea, for want of the requisite particulars.

Judgment for Plaintiff.

MICHELL and MARGARET his Wife, and TARLETON and ISABELLA his Wife, *v.* Lady BETHIAH HUGHES.

June 23.

WRIT of entry *sur* abatement in the *per*, of premises, which the the demandants, in right of their wives, claimed to be the right and inheritance of the said *Margaret* and *Isabella*, and into which the said Lady *Bethiah* had not entry but by one *Mary Heywood*, who unjustly abated into the same after the death of one *Thomas Collingwood*, the uncle of the said *Margaret* and *Isabella*, and whose heiresses they are, within fifty years last past.

A right of entry vested in husband and wife in right of the wife, passes to the assignees of the husband if he become bankrupt.

The Defendant pleaded, fifthly, that *Tarleton* was a trader, incurred a petitioning creditor's debt, and became

1830.

MICHELL v. HUGHES.

came a bankrupt in 1815, when a commission of bankruptcy issued against him; and by an indenture between the commissioners of bankrupts of the one part, and the assignees of *Tarleton* of the other part, the commissioners bargained and sold to the assignees, their heirs and assigns, all the freehold and copyhold messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, situate, lying, and being in the respective counties of *Middlesex*, *Lancaster*, and *Northumland*, and elsewhere in the United Kingdom of *Great Britain* and *Ireland*, and also all the freehold and other messuages, lands, tenements, plantations, estates, and hereditaments, and the negroes and other slaves, servants, cattle, stores, stocks, implements, and other the appurtenances, situate, lying, and being in the islands of *Grenada*, *Dominica*, *St. Vincent*, *St. Lucia*, *Trinidad*, or in any other islands, parts, or places in the *West Indies*, or in the colonies of *Demerara*, *Surinam*, *Essequibo*, or any other the colonies or territories belonging to the said kingdom; and all other the real estate, lands, tenements, or hereditaments whatsoever, and wheresoever situate, lying, and being, whereof, or wherein, or whereunto, respectively, the said *Tarleton*, whether in his own right, or as surviving partner of *Daniel Backhouse*, deceased, or otherwise, at the time the said *Tarleton* became bankrupt, or at any time since, had any estate, right, title, or interest, in possession, reversion, remainder, or expectancy, or otherwise howsoever, with their and every of their appurtenants, and all the estate, right, title, interest, use, trust, property, benefit, power, equity of redemption, claim, and demand whatsoever, both at law and in equity of the said *Tarleton*, or of them the said commissioners, by virtue of the said commission, of, in, and to the same premises, every or any part thereof; and the reversion and reversions, remainder and remainders, rents,

rents, issues, and profits thereof, and of every or any part or parcel thereof, together with all deeds, evidences, and writings touching and concerning the same; to hold the same unto the said assignees, their heirs and assigns, for ever, upon trust nevertheless to and for the several uses of them the said assignees, and all other the creditors of the said *Tarleton* who then had sought, or who afterwards should in due time come in and seek relief by virtue of the said commission. And the said Lady *Bethiah* further said, that the said bargain and sale was duly enrolled in His Majesty's High Court of Chancery in *England*, and that by force of the said bargain and sale, and of the statute in that case made and provided, the said assignees then and there became and were entitled to all the right and interest of the said *Tarleton* of and in the said tenements, with the appurtenances in the said declaration mentioned, he the said *Tarleton*, previously to the said bankruptcy, having had by the said *Isabella* issue capable of inheriting the said tenements, with the appurtenances.

Demurrer and joinder.

Jones Serjt. for the demandant. It will be contended for the Defendant, that the right to bring this writ of entry passed under the assignment of the commissioners in *Tarleton's* bankruptcy, so that his assignees ought to be the demandants, and that, therefore, he and his wife cannot sue. But in order to establish this, the Defendant must shew that there was an estate in *Tarleton* which might and did pass by the bargain and sale, in respect of which estate such assignees could bring a writ of entry; for the record admits that this writ is maintainable but for the bankruptcy. The bankrupt law could not pass more than *Tarleton* had, though *Tarleton* might have had an interest which the bankrupt

1830.

MICHELL v. HUGHES.

law did not pass. Now *Tarleton* had no seisin in his own right: his wife had a right to bring a writ of entry; but even she was not seised, for the abatement had displaced any immediate interest. Even had there been no abatement, *Tarleton*, being seised only in right of his wife, had a mere derivative or vicarial right, and could not alone have brought a writ of entry. He was not even tenant by the courtesy. To admit of that there must be in the wife a seisin in deed. A seisin in law is not sufficient. "A man shall not be tenant by courtesy of a bare right." (*a*) He could, therefore, only be introduced into the action for the sake of conformity, having no interest whatever in the land itself. It is true that the rents might go to the husband if the demandants succeed, because the rents would become then *fruits fallen*: but the right to the rents, when recovered, is perfectly distinct from the right to bring the action. If the husband had been attainted, the king could not have had the profits. The freehold would have remained in the wife. (*b*) On forfeiture of the profits during the coverture, the freehold remains in the wife. Dame *Hale's* case. (*c*) If the wife had been attainted, the lord might have entered and put out the husband. But the right to recover the land of the wife consists only in privity, and cannot be forfeited or assigned in law. Marquis of *Winchester's* case. (*d*) And, supposing the assignees entitled to sue, are the assignees and the wife to be on the record together, or are the assignees to sue alone?

In *Smith* v. *Coffin* (*e*), a writ of entry *sur* abatement was held to lie for the assignees of a bankrupt; but the ground of that case is, that the bankrupt himself had an actual interest, and every thing that belongs to the bankrupt passes to his assignees. Here he had nothing

(*a*) *Co. Lit.* 29 *a.*
(*b*) *Co. Lit.* 351.
(*c*) *Plowd.* 260.
(*d*) 3 *Rep.* 2.
(*e*) 2 *H. Bl.* 444.

which,

which, in the language of the earlier statutes, he could lawfully depart withall, and pass to the assignees.

Then, this writ of entry demands the right and inheritance: and what claim could the husband have to the inheritance? In *Jacobson* v. *Williams* (*a*), and other cases, it has been held, that a possibility will pass under the assignment: but it must be a possibility that can be released or assigned; and there was nothing here that could be released or assigned.

Merewether Serjt. *contrà*. The husband had, in respect of the coverture, an interest which might pass to his assignees; and if his interest did pass, it is quite clear that the right of entry passed also to his assignees. That point is established by the case of *Smith* v. *Coffin*.

In the case of attainder of the wife, the freehold of the wife is put an end to; and it does not affect the present case, that under such circumstances nothing should remain to the husband. But *Jewson* v. *Moulson* (*b*) and *Higden* v. *Williamson* (*c*), have established that a contingent interest, or possibility in a bankrupt, is assignable. Those cases, indeed, were decided on 5 *G.* 2. *c.* 30. But in the modern law, there is nothing to limit the extent of property which passes to the assignees. Every beneficial interest passes; and this was a beneficial interest.

Jones. In *Smith* v. *Coffin*, the bankrupt had a right peculiar to himself, and not in *autre droit*. And the same observation applies to *Higden* v. *Williamson*.

Cur. adv. vult.

TINDAL C. J. The point raised for the consideration of the Court by the Defendant's plea is this, —

(*a*) 1 *P. Wms.* 382. (*b*) 2 *Atk.* 417. (*c*) 3 *P. Wms.* 132.

1830.

MICHELL v. HUGHES.

Whether the bankruptcy of *John Tarleton*, the husband of *Isabella*, one of the co-heiresses named in the writ, which bankruptcy took place after the abatement made upon the two co-heiresses, gives any right to bring a writ of entry to his assignees? For if the right to bring a writ of entry for any immediate estate of freehold is vested in the assignees, it follows that the demandants cannot recover in the present action.

If the writ of entry *sur* abatement, in the present case, had been brought to recover land to which the bankrupt made title to himself by descent in his own right, there could be no doubt, after the decision of the case of *Smith* v. *Coffin*, but that the right to bring such writ would have passed to the assignees under the usual bargain and sale from the commissioners. For as that case has established that such right of entry was an hereditament within the meaning of the bankrupt act, and that it passed to the assignees under the general words inserted in the bargain and sale, we think the same construction must be put on the present bankrupt act, notwithstanding the omission of some words in the sixty-fourth section which are to be found in the previous acts; for we think neither the extent nor the nature of the bankrupt's property intended to be vested in the assignees for the benefit of the creditors, is thereby in any way limited or confined.

But it is contended by the demandants, that the title to the land in the present writ not being made in right of the bankrupt, but in right of the wife, the husband is joined therein for conformity only, and that in consequence no right to bring the action can pass to the assignees.

This depends upon the question, What rights in the wife's estate pass to the assignees of the husband under the commissioners' bargain and sale?

If the husband had been actually seised of this land

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in right of his wife, the assignees would have taken, under the bargain and sale, an immediate estate of freehold during the coverture. (*Com. Dig. Bankrupt*, (D) 11.) It is unnecessary, therefore, to consider any claim of the husband as tenant by the courtesy; it is sufficient for the present purpose to observe, that if the wife's seisin had been a seisin in fact, the husband would have become seised of the freehold in her right during the coverture.

If, then, such would have been the husband's right, such also would have been the right of the assignees under the bargain and sale; and if the assignees are to bring the writ of entry when the abatement has been made upon the bankrupt, in order to recover the fee which he then claims to be his right and inheritance, there seems every reason, by analogy, that when the abatement is made upon the wife, the right to bring the writ for the freehold which the husband would become entitled to would also pass to the assignees. Debts due to the wife *dum sola*, and other choses in action belonging to the wife before marriage, pass to the assignees under the commissioners' assignment, and are recoverable by them in their own name. *Miles* v. *Williams*. (*a*) And the reason given by Chief Justice *Parker*, in delivering the opinion of the Court in that case, is, "That it was the intention of the bankrupt law that the bankrupt should not be trusted any more with the arrangement of his estate, but that it should be put into other hands for the safety of the creditors, and that the bankrupt should have no further intermeddling therewith."

It is argued that the demandants claim in this writ the fee and inheritance, and that it is impossible to contend that the assignees should ever claim the inheritance which belongs to the wife, and in no respect to the

(*a*) 1 *P. Wms.* 249.

husband.

1830.

MICHELL v. HUGHES.

husband. It may be admitted that this is the case; and if the inheritance were necessarily claimed, and no writ of entry could be found to recover a freehold only, the inference would be very strong that no right of action could vest in the assignees in respect of the abatement on the wife.

But it is clear that the demandant in a writ of entry may claim the freehold only. See *Dyer*, 101. *a.*, where the count in a writ of entry, having stated the demandant to have been seised as of fee, was amended by a statement that he was seised at *de libero tenemento.* And in *F. N. B.* 443. *a.* it is laid down, that if tenant for life or tenant in tail be disseised, they may sue a writ of disseisin; but in that writ it shall not be said *quod clamat esse jus suum et hereditatem suam*, and in his count he shall set forth his especial esplees, &c. See also *Rast. Ent.* 272. *Co. Ent.* 219. So that the argument that the assignees could not sue, because they could not maintain this writ, fails where it is shewn that they might maintain another better adapted to the estate which they would claim.

Upon the general ground, therefore, that in all instances in which the assignees take any interest derivatively from the bankrupt, for the benefit of the creditors, they are empowered by the bankrupt act to sue in their own name, we think the present count, in which the bankrupt sues to recover in his own name and that of his wife, land in which he would take a freehold that would forthwith belong to the assignees, cannot be supported.

Cases may occur, in which, from absolute necessity, the husband must be joined in order to recover the rights of the wife; upon those we give no opinion.

Judgment for Defendant.

1830.

UNDERHILL *v.* Sir T. WILSON, Bart.

June 22.

A sheriff's officer, at the request of *U.*, against whom he had to execute a *fi. fa.*, continued in possession of the effects levied, and carried on the business of a farm for *U.* during three months; an action was then brought by the sheriff, and judgment obtained against a purchaser of *U.*'s crops, &c., upon which a balance remained in favour of *U.* after defraying the amount to be levied against *U.*, and the attendant expenses. The sheriff having in his return taken credit for the expenses in carrying on the farm, and having afterwards, by letter, admitted the sum recovered from the purchaser of the crops, without repudiating the conduct of the officer, Held, that he, and not his officer, was liable for the balance to *U.*, notwithstanding the officer had managed the farm at *U.*'s request.

THIS action was brought to recover a balance alleged to be in the hands of the Defendant, as sheriff of *Kent*, arising from the sale of the Plaintiff's household furniture, farming stock and effects, taken by the Defendant in an execution issued against *Underhill* by one *Prickett*, after paying the sum which the Defendant was authorized to levy, and the legal expenses attending the execution.

In *June* 1828, a writ of *fi. fa.* against *Underhill* at the suit of *Thomas Prickett*, indorsed to levy 418*l.* 12*s.* 4*d.* besides costs of the writ, sheriff's poundage, officer's fees, and all other incidental expenses, and returnable on the first day of *Michaelmas* term 1828, was delivered at the office of the Defendant, sheriff of *Kent*, and a warrant was thereupon granted to *Richard Hoskins*, the sheriff's bailiff, to be executed.

After *Hoskins* had taken possession of *Underhill*'s farm and effects under this warrant, it was agreed between *Prickett* and *Underhill*, who was *Prickett*'s brother-in-law, that *Hoskins* should hold possession under his warrant till *Michaelmas*, (at which time one *Martin* was to become tenant of the farm,) and that the crops should be got in, as the same became in a fit state, and sold. *Hoskins* accordingly entered into this arrangement, and continued in possession of the effects of *Underhill*, consisting of household goods,

farming

1830.

UNDERHILL v. WILSON.

farming stock, growing crops of hops, wheat, hay, underwood, &c., until *Michaelmas*, suffering *Underhill* to carry on the farm: he advanced money to *Underhill* for this purpose; paid wages and various other expenses; and from time to time disposed of the crops as they became fit, and sold the household furniture by public auction. *Martin*, the incoming tenant, had agreed to take of the sheriff all the hay, straw, underwood, manure, &c. at a fair valuation. *Martin* having at *Michaelmas* taken possession of the farm, *Hoskins* required him to pay the amount of the valuation, 190*l.* *Martin*, however, refused to pay more than 84*l.* 14*s.* 6*d.*

Shortly after the writ was returnable, *Prickett*'s attorney ruled the sheriff to return the *fi. fa.* After sundry fruitless applications to *Martin* for the 190*l.*, the sheriff returned the writ as follows: — "I have levied and made of the goods and chattels of *Henry Underhill* to the value of 750*l.* 13*s.* 4*d.*, out of which I have paid for rent, 143*l.*; for king's taxes, 4*l.* 8*s.* 4*d.*; for duty on hops, 49*l.* 9*s.*; for labour and expenses, 145*l.* 11*s.* 4*d.*; for possession and for auctioneer's charges, 48*l.* 10*s.* 7*d.*; and the residue, after deducting therefrom the sheriff's legal poundage, I have ready, as by the said writ I am commanded. And the said *Henry Underhill* hath not any other or more goods or chattels in my bailiwick, &c. &c."

This return included only 84*l.* 14*s.* 6*d.* of the valuation to *Martin*, and was, therefore, objected to by *Prickett*'s attorney, who wished an action to be brought against *Martin* for the whole amount of the valuation, viz. 190*l.*

In *Hilary* term 1829, an action was accordingly brought by the sheriff against *Martin*, in which *Martin* let judgment go by default, and a writ of inquiry was executed. And it appearing in evidence that *Martin* had paid

paid to the landlord 43*l.* 13*s.* 2*d.* on account of rent, the jury gave a verdict for the sheriff for 146*l.* 14*s.* 10*d.* damages, besides costs, which *Martin* subsequently paid into the hands of the sheriff. This payment was admitted by the following letter from the under-sheriff to *Underhill*'s attorney: —

"*Prickett* v. *Underhill.*

"SIR,—This writ is returned and filed in the proper office, and you will see from that what amount was levied at the time the return was made; since which we have recovered from a Mr. *Martin* a further sum upon a valuation made to him, which must be added to the sheriff's return as soon as we can settle with the Plaintiff, which we have not been able to do. If you are concerned for *Underhill*, you may, on making an appointment, inspect the accounts at our office, now in our possession.

Mr. *Underhill*, however, who is related to the Plaintiff, and for whose accommodation the farm was carried on, knows pretty well the amount of the expenses; he himself having received from the officer, and laid out, the greater part of the money.

"Yours, &c.

The 146*l.* 14*s.* 10*d.* recovered from *Martin*, added to 750*l.* 13*s.* 4*d.* actually levied, make a total of 897*l.* 8*s.* 2*d.* The sum directed to be levied, 418*l.* 12*s.* 4*d.*, added to the expenses specified in the foregoing return, — 390*l.* 19*s.* 3*d.*, — amount only to 809*l.* 11*s.* 7*d.*, leaving a balance in favour of *Underhill*, for which a verdict was given at the trial before *Tindal* C. J. It was alleged, however, by the Defendant, that the balance had been left in the hands of *Hoskins*, who, at the request of *Underhill*, had laid it out in farming expenses; wherefore

Spankie

1830.

UNDERHILL v. WILSON.

Spankie Serjt., pursuant to leave reserved at the trial, obtained a rule *nisi* to set aside the verdict, on the ground that *Hoskins*, in undertaking the management of the farm at the request of *Underhill*, instead of selling the effects at once, had become the agent of *Underhill*, and that the action ought to have been brought, if at all, against *Hoskins*. He cited *Crowder* v. *Long* (*a*), where the bailiff having acted out of the line of his duty, it was held, that as between the sheriff and the execution creditor, the act of the bailiff was not to be considered the act of the sheriff, so as to fix the latter with knowledge of the misconduct of his officer.

Wilde Serjt., who shewed cause, contended that the sheriff, by charging in his return the expenses of managing the farm, and above all by the under-sheriff's letter, acknowledging the sale to *Martin*, had ratified the conduct of the officer, and had adopted all his acts. In *Crowder* v. *Long* the sheriff was not acquainted with the most material part of his officer's conduct.

Spankie. The sheriff could not refuse to return the writ; the return, therefore, is to be referred to his public duty, and not to any adoption of *Hoskins*'s acts; and as the under-sheriff's letter is merely explanatory of the return, it is subject to the same observation. But the sheriff is not responsible for the conduct of his officer, where it is out of the course of duty which the law imposes on such officer. The duty of the officer was to levy and sell at once: if, at the request of *Underhill*, he neglected that duty, and undertook to manage a farm, and receive money for the sale of crops, *Underhill* must look to the officer whom he so constituted his

(*a*) 8 *B.* & *C.* 598.

own

own agent, and not call on the sheriff to make good irregularities committed at his own request. It is clear that the conduct of the officer is severable from the duty of the sheriff. In *Cook* v. *Palmer* (*a*), *Bayley* J. says, "An arrangement was made by the plaintiffs and *Theobald*, authorizing the officer to sell the whole of the goods for a certain sum. Upon that sale the officer was identified with the sheriff, to the extent of the sum to be levied, but not further; his authority to sell to a greater extent not being derived from the sheriff, but from the plaintiffs and *Theobald*, who thereby made him their agent as to that part of the transaction." And in *Porter* v. *Viner* (*b*), it is clearly established that the sheriff is not responsible for a by-act of his officer, not done in pursuance of his duty. So in *Pallister* v. *Pallister* (*c*), where the plaintiff appointed a special bailiff, the sheriff was discharged, although the bailiff had taken fees to which he had no right.

TINDAL C. J. The question is, whether this action for money had and received ought to have been brought against the sheriff, or against *Hoskins* as the personal agent of the Plaintiff; and it has been contended that the action ought to have been brought against *Hoskins*.

At the commencement of the business, indeed, *Hoskins* was acting in the management of the farm as agent of the Plaintiff; and for what was done in the management of the farm, it is clear an action would not lie against the sheriff. And I may go so far as to say, that in some circumstances the sheriff might not be bound

(*a*) 6 *B.* & *C.* 739.
(*b*) In a note to *R.* v. *Sheriff of London*, 1 *Chitty*, 613.
(*c*) *Ibid.*

even

1830.

UNDERHILL v. WILSON.

even by his own return. But what renders him responsible in the present case is the letter written by his own agent, the under-sheriff. It would have been easy for him to have said that the sheriff would not hold himself responsible for the acts of *Hoskins*. But, instead of that, he says, "we have recovered a farther sum upon a valuation made to *Martin*, which must be added to the sheriff's return as soon as we can settle with the Plaintiff. If you are concerned for *Underhill*, you may inspect the accounts at our office, now in our possession."

Can it be contended that after this the sheriff is not liable to refund the money which is thus proved to have come to his hands? If the action had been brought against *Hoskins*, it would have been objected, *respondeat superior*; and that the agent ought not to be sued where the principal is known, and has sanctioned the conduct of the agent by receiving from him the sum in dispute.

Rule discharged.

June 22.

POTT *v.* TURNER and Another.

A ship-broker is, as such, liable to be made a bankrupt.

THIS was an action of *assumpsit* brought by the Plaintiff, to recover a deposit which he had made on an agreement to purchase an estate from the Defendants.

The main question on the trial was, whether or not a shipbroker, named *Baker*, who had previously assigned the estate to the Defendants, was liable to the bankrupt laws, his affairs being at the time in a state of embarrassment.

Baker's

1830.

POTT v. TURNER.

Baker's brother stated that they had been in business at one time as ship-owners; but, that after the war, they sold all their ships, and entered into partnership as ship-brokers. They obtained payments of the freights of ships, which they paid over to the owners who employed them, after deducting their commission. They procured cargoes for ships, and consigned cargoes which arrived, to those for whom they were sent. They obtained the freight for these cargoes, and paid it over in the manner before mentioned. For several years past they had not shared any profits, as there were none to share. All the known creditors to the amount of 20*l.* agreed to take a composition for the debts on their joint estate, and to release *Baker*, he having assigned his property to them. The release, however, had not been executed by all.

A verdict having been found for the Plaintiff,

Wilde Serjt., pursuant to leave reserved at the trial, obtained a rule *nisi* to set it aside and enter a nonsuit, on the ground that a ship-broker is not, as such, subject to the bankrupt laws; and that, at all events, there had been no proof that *Baker* owed any debt of sufficient amount for a petitioning creditor.

Cross Serjt. shewed cause. Either as a broker, or as a person receiving other men's monies, *Baker* was subject to the bankrupt law. The statute 6 *G.* 4. *c.* 16. *s.* 2. enacts, that all bankers, brokers, and scriveners receiving other men's monies or estates into their trust or custody shall be deemed traders liable to become bankrupt.

The sentence, "receiving other men's monies or estates into their trust or custody," is adjective to bankers, brokers, and scriveners; and therefore a broker receiv-

1830.

POTT v. TURNER.

ing other men's monies, as *Baker* did, is within the operation of the statute, although he be not a broker in the ordinary sense for the management of mercantile contracts.

But if the Court should hold otherwise, a ship-broker who effects contracts for freight, falls at least as much within the general meaning of the word broker as a pawnbroker, who merely receives a deposit, and arranges no contract. And a pawnbroker has expressly been holden to be a broker within the meaning of the act. *Rawlinson* v. *Pearson.* (*a*)

If *Baker* was subject to the bankrupt laws, that is a sufficient objection to the Defendant's title, although no petitioning creditor's debt were established; and there is no performance by the Defendants of their agreement to deduce a clear title to the premises. *Wilde* v. *Fort* (*b*), *Lowes* v. *Lush* (*c*), *Hartley* v. *Smith.* (*d*)

Wilde. A ship-broker is not a trader, and the "receiving other men's estates into their care or custody," applies only to *scriveners*, the last antecedent to the sentence. And this clearly appears from the first statute which made scriveners subject to the bankrupt laws, 21 *Jac.* 1. *c.* 19. *s.* 2., where, by no mode of reading the clause, can the sentence "receiving other men's monies or estates," &c. be applied to any substantive besides *scriveners.*

And a ship-broker does not come within the meaning of the word *broker* in its general application. The business of a ship-broker is to buy and sell ships for others, and, incidentally to that, he procures cargoes for ships and receives freights. But the business of a broker is to deal with money; his duties and emolu-

(*a*) 5 *B.* & *A.* 124.
(*b*) 4 *Taunt.* 334.
(*c*) 14 *Ves.* 547.
(*d*) *Buck.* 368.

ments

ments are regulated by acts of parliament; and a ship-broker has been expressly holden not to be a broker within the meaning of those acts. *Gibbons* v. *Rule.* (*a*)

The receipt of commission only renders subject to the bankrupt laws such as use the trade of merchandize. If *Baker* received money, deducting a commission, he received it, not to trade with, but to pay over.

At all events the Plaintiff has no sufficient objection to the Defendant's title, and is not entitled to recover without shewing by the proof of a petitioning creditor's debt that *Baker* was liable to have a commission of bankrupt sued out against him. The cases in equity do not apply, because a decree for specific performance does not depend on sufficiency of legal title.

TINDAL C. J. This is an action to recover a deposit on a contract for the purchase of an estate. And the question is, Whether the Defendants can make a good title to the purchaser? That depends on the question Whether the party who conveyed to the Defendants be or be not subject to the bankrupt laws? A subordinate question has also arisen, Whether, supposing him to be subject to the bankrupt laws, it was incumbent on the Plaintiff to prove the existence of a petitioning creditor's debt as well as an act of bankruptcy?

Whether or not *Baker* was subject to the bankrupt laws depends on the 6 *G.* 4. *c.* 16. *s.* 2., the language of which is, "That all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, and persons insuring ships or their freight, or other matters, against perils of the sea, shall be deemed traders liable to become bankrupt."

(*a*) 4 *Bingh.* 201.

1830.

POTT v. TURNER.

It has been contended, on the part of the Defendants, that this section of the act, whether the clause be taken separately or conjointly, does not bring *Baker* within the meaning of the act. In fact, it is said that he cannot, strictly speaking, be called a broker. A broker is one who makes bargains for another, and receives a commission for so doing; as, for instance, a stock-broker. But, in common parlance, one who receives the payment of freights for the shipowner, and negotiates for cargoes, is a broker. In *Rawlinson* v. *Pearson*, a pawnbroker was considered by all the Judges to be a broker, and to be subject to the bankrupt laws, although he did not make contracts, but merely received the effects of other persons into his custody in the same manner as a banker did the money of his customer. Are we, then, going farther when we hold a ship-broker to be within the operation of the statute? I should have felt some difficulty if the question had been confined to the 21 *Jac.* 1. *c.* 19., where the "receiving other men's estates into their care" is confined to scriveners. But in the next statute relating to bankruptcies, the 5 *G.* 2. *c.* 30. the sentence is applied to bankers, brokers, and factors. The words are, "And whereas persons dealing as bankers, brokers, and factors, are frequently intrusted with great sums of money, and with goods and effects of very great value belonging to other persons: it is hereby further enacted, that such bankers, brokers, and factors shall be, and are hereby declared to be, subject and liable to this and other the statutes made concerning bankrupts." That is, such bankers, brokers, and factors as are intrusted with sums of money and effects belonging to other persons. When we come, therefore, to the new act, and see the same words connected with bankers, brokers, and scriveners, we must hold that the latter words in the section

section apply to all of them. And that appeared to be the view of the Court in *Rawlinson* v. *Pearson*. As well, therefore, under the word *broker* as the words following it, I am of opinion that the party in the present case who received commission for finding cargoes for ships, and was intrusted with the receipt of freight, was liable to be made a bankrupt. With respect to the second question, whether there was sufficient evidence that a commission might have issued, it appears to me that the evidence was sufficient. The brother had said, that there were no debts due on their joint estate; but there might be debts on the separate estate of *Thomas Baker*, and the case falls within the principle of *Lowes* v. *Lush*, where the Court refused to enforce a contract because the title sold was liable to be questioned under the operation of the bankrupt law.

PARK J. I am of the same opinion. A shipbroker is, in common parlance, a broker; he negotiates freights, and receives other men's money, and is as much subject to the bankrupt laws as a pawnbroker. *Rawlinson* v. *Pearson* was a case very fully considered by most eminent judges, and much reliance was placed on the opinion of Lord *Hardwick* in *Highmore* v. *Molloy* (*a*), where a pawnbroker was holden to be a broker. The same point was also established by *Wood* B. in a case from the Common Pleas at *Lancaster*. A shipbroker therefore is a broker within the meaning of the statute; but the sentence "receiving other men's estates into their care or custody" applies as well to the word *brokers* as to the word scriveners, which immediately precedes it. For the argument which has been drawn from the 21 *Jac.* 1. *c.* 19. vanishes when we consider the language of 5 *G.* 2. *c.* 30.

(*a*) 1 *Atk.* 206.

1830.

POTT v. TURNER.

Upon the second question, I am of opinion that the Plaintiff is not bound to take a doubtful title, and the present discussion shews that the title which the Defendants offer is at least doubtful. There was obviously a possibility that *Baker* might have had separate creditors, and have been liable to a commission at their instance.

GASELEE J. If there were any doubt on the new statute, it is removed by the language of 5 *G.* 2. *c.* 30., because a broker there is described as one intrusted with great sums of money, and with goods and effects of great value belonging to other persons; and the thirty-ninth section enacts, "That such bankers, brokers, and factors shall be and are hereby declared to be subject and liable to this and other statutes made concerning bankrupts." Insurance brokers have also been holden subject to the same law. Upon the second question it is not necessary to say more than that courts of equity will not compel a purchaser to take a doubtful title, and that the present discussion shews there is doubt in this.

BOSANQUET J. I consider a shipbroker as liable to the bankrupt law within the meaning of 6 *G.* 4. *c.* 16.: he is employed in negotiating contracts for freight, in receiving money for his principals, deducting commission, and paying over the difference. It has been urged that the sentence "receiving other men's estates into their custody" is confined to *scriveners*, and the 21 *Jac.* 1. *c.* 21. has been relied on in support of that argument. But in the 5 *G.* 2. *c.* 30. *s.* 39. the same words are expressly applied to brokers who receive other men's monies, and the 6 *G.* 4. *c.* 16. combines them in one sentence with bankers and scriveners.

Baker

1830.

POTT v. TURNER.

Baker therefore, as a broker, or as receiving other men's monies into his custody, was liable to the bankrupt laws; and, if so, have the Defendants fulfilled their engagement to make out a clear title to the property sold? Seeing that *Baker* is subject to the bankrupt laws, it rests with them to satisfy the purchaser that no petitioning creditor's debt could be established against him. But when we see that he had made an assignment to his creditors, and that all of them had not executed a release, it is impossible to say that the Defendants have made out a clear title to the property in question. The rule which has been obtained must, therefore, be discharged.

Rule discharged.

FOSTER and Others *v.* WESTON.

June 25.

THE Plaintiffs sued on the following instrument under seal: — "*Sierra Leone*, 17th *May* 1828. We, *Kenneth M'Aulay*, *Henry Weston*, and *John Hamilton*, do hereby bind ourselves jointly and severally to Messrs. *Foster* and *Smith*, of *London*, for the due and sufficient payment of the sum of 1500*l.* sterling, which amount is to be handed over and delivered to *Robert Dargan* in goods for sale on their account at the invoice prices with expenses, that is to say, that the goods shall amount to 1300*l.* sterling, calculating that the expenses will amount to 200*l.*, making together 1500*l.* as before stated. Now, the condition of this obligation is such, that the said sum of 1500*l.* is to be duly paid and remitted to *Foster*

Defendants bound themselves by deed to pay 1500*l.* to be delivered to *R. D.* in goods, by three payments of 500*l.* each, at three, five, and seven months:

Held, that the instrument did not carry interest.

1830.
FOSTER
v.
WESTON.

and *Smith* in three equal payments of 500*l.*, at three, five, and seven months from this date. And we, *K. M.*, *H. W.*, and *J. H.*, hereby bind ourselves for the due payment of the same at those periods. In failure of which we acknowledge and hereby render ourselves liable to be sued and proceeded against for the amount. Witness our hands," &c.

The prothonotary having computed and allowed interest on a rule to stay proceedings on payment of the sum due and costs,

Wilde Serjt. obtained a rule *nisi* for the prothonotary to review his taxation and disallow the interest.

Spankie Serjt. shewed cause. The interest was properly allowed. The rule is, that a party is entitled to interest upon a sum payable at a day certain, or secured by any mercantile instrument. This instrument, though purporting to be a bond, is plainly a mercantile contract; it differs only by the formality of sealing from bills of exchange for the same amount, payable at three, five, and seven months; and the days on which the sums are payable are equally certain. In *Farquhar* v. *Morris* (*a*), where a bond dated on a day certain in a penal sum, conditioned for payment of a lesser sum generally, without naming any day of payment, was payable on the day of the date, the Court referred it to the Master to compute principal, interest, and costs thereon, and held that interest was due on such bond though not expressly reserved. In *De Havilland* v. *Bowerbank* (*b*), Lord *Ellenborough* said, "It appears to me, that interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on

(*a*) 7 *T. R.* 124. (*b*) 1 *Campb.* 50.

bills

bills of exchange, promissory notes, &c.; or where there has been an express promise to pay interest; or where, from the cause of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that the money has been used, and interest has been actually made." In *Hogan* v. *Page* (*a*), the proceedings were on a single bond, evidently not a mercantile instrument; and in *Higgins* v. *Sargent* (*b*),—where it was held, that in covenant upon a policy of insurance upon the life of *A.*, payable six months after due proof of his death, the assured were not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of *A.*,—the day of payment was uncertain, depending on the life of *A.* But in *Page* v. *Newman* (*c*), the rule was again confirmed, that interest is not payable on money secured by a written instrument, unless it appear on the face of the instrument itself that interest was intended to be paid, or unless it be implied from the usage of trade, *as in the case of mercantile instruments.* The instrument in that case was rather an agreement than a promissory note, and the sum was payable on a contingency, not on a day certain. And though the rule propounded in *Arnott* v. *Redfern* (*d*) was impugned by Lord *Tenterden* as being somewhat too liberal on the subject of interest, it may be questioned whether the law of *Scotland*, which that decision upheld, is not more consistent with justice than a practice which enables a debtor, by withholding payment, to deprive his creditor of the use he would have been enabled to draw from his money if it had been paid according to the debtor's engagement.

(*a*) 1 *B.* & *P.* 337.
(*b*) 2 *B.* & *C.* 348.
(*c*) 9 *B.* & *C.* 378.
(*d*) 3 *Bingh.* 353.

Wilde

1830.

FOSTER v. WESTON.

Wilde in support of his rule. This is not a commercial instrument; nor one in respect of which there has been a usage to allow interest; nor has the obligation any penalty attached to it, out of which a more extensive remedy can be administered by equitable adjustment; one of which ingredients may be found in all the cases in which interest has hitherto been allowed. In *Farquhar* v. *Morris*, there was a penalty. And in *Gordon* v. *Swan* (*a*), Lord *Ellenborough* limited to bills of exchange, and such like instruments, and agreements expressly reserving interest, the rule as to payments on a day certain, laid down in *De Havilland* v. *Bowerbank*. In *Slack* v. *Lowell* (*b*), the goods were to be paid for by a bill of exchange; and in *Mountford* v. *Willis* (*c*), the Court merely refused to reverse a verdict, where a jury had allowed interest on a price to be paid on a given day. But in *Higgins* v. *Sargent*, *Abbott* C. J. said, "It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. It is of importance that this rule should be adhered to; and if we were to hold that interest was payable in this case, the application of the rule might be brought into discussion in many others." *Bayley* J. "It was once the opinion, that money lent carried interest, and in *Calton* v. *Bragg* (*d*), it was so contended, on the ground that the lender would otherwise, for the accommodation of the borrower, lose the benefit which he might make of his capital; and that the lender ought, in equity, to be put in the same situation as if he had applied his prin-

(*a*) 12 *East*, 419.
(*b*) 3 *Taunt*. 157.
(*c*) 2 *B. & P*. 337.
(*d*) 15 *East*, 223.

cipal

cipal to his own use. But this Court held, that interest was not due by law for money lent without a contract for it, expressed, or to be implied from the usage of trade, or from special circumstances. Now, if interest be not due for money lent, which is to be repaid either upon demand or at a given time, it follows that it is not due for money payable within a certain time, after due proof of the happening of a particular event." *Holroyd* J. "It is clearly established by the later authorities, that unless interest be payable by the consent of the parties, express, or implied from the usage of trade, (as in the case of bills of exchange) or other circumstances, it is not due by common law. Even in *De Havilland* v. *Bowerbank*, Lord *Ellenborough* was of opinion, that where money of the plaintiff had come to the hands of the defendant, to establish a right of interest upon it, there should either be a specific agreement to that effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money having been used: and in *Gordon* v. *Swan*, although the money was payable at a particular day, nonpayment at that day was held not to give any right to interest. Independently of these authorities, I am of opinion, upon the principles of the common law, that interest is not payable upon a sum certain payable at a given day."

And in *Page* v. *Newman*, Lord *Tenterden* said, "It is a rule, sanctioned by the practice of more than half a century, that money lent does not carry interest."

TINDAL C. J. There can be little doubt that the party who framed this instrument intended that it should operate as a bond: but it has not that effect; for there is no penalty, and the parties are bound only in the amount which is to be actually paid. It is only *simplex obligatio*, and the question is, Whether, in all cases

in

1830.

FOSTER v. WESTON.

in which money is made payable at a day certain, the party is entitled to interest. The case of *Higgins* v. *Sargent*, in which, on the death of the party the day became certain, will govern the present; and there are many cases in which sums are payable on a day certain, and yet interest is not recoverable. For instance, rent is reserved payable on a day certain, and yet, where debt or covenant is brought for rent, a jury would not be warranted in giving interest. If it be the intention of the party to obtain interest, it is always in his power to insert in the contract an express stipulation to that effect. In the present case, there is no stipulation for interest on the face of the contract. The instrument on which it is sought to recover it is not a commercial instrument, nor one on which there has been any usage to allow interest. We ought not to break into the rule, which is now well understood, and therefore this rule must be made absolute.

PARK J. I do not say that the law of *Scotland* on this point is not wise, and there certainly has been a diversity of practice here; but the question is, What is the rule now established. Two reasons have been urged for allowing the Plaintiffs interest here; the first, that the sums are payable on a day certain; and, secondly, that this is a mercantile contract. I think this is not a mercantile contract. And as to the argument deduced from the payment on a day certain, it is answered by the cases which have been alluded to, particularly *Higgins* v. *Sargent*. There it was held, that in covenant upon a policy of insurance upon the life of *A.*, payable six months after due proof of his death, the assured were not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of *A.*

In the other case of *Page* v. *Newman*, the rule was most

most accurately laid down by Lord *Tenterden*, and it ought to be uniform in all the courts till the legislature shall have altered it.

GASELEE J. In early periods of the law we find the decisions on this point conflicting, but according to the practice of late years, this is clearly not a case in which interest can be allowed.

BOSANQUET J. I am of the same opinion. Exceptions to the rule for the allowance of interest ought not to be unnecessarily multiplied. There is no stipulation here for interest on the face of the contract. The instrument is not a mercantile instrument, though perhaps originating in a mercantile transaction; nor is it one on which there is any usage for the allowance of interest.

Rule absolute.

1830.

DAVIS v. GARRETT.

Plaintiff put on board Defendant's barge, lime, to be conveyed from the *Medway* to *London*. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the barge taking fire thereby, the whole was lost:

Held, that the Defendant was liable, and the cause of loss sufficiently proximate to entitle Plaintiff to recover under a declaration alleging the Defendant's duty to carry the lime without unnecessary deviation, and averring a loss by unnecessary deviation.

THE declaration stated, that theretofore, to wit, on the 22d day of *January* 1829, at *London*, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, the Plaintiff, at the special instance and request of the Defendant, delivered to the Defendant on board a certain barge or vessel of the Defendant called the *Safety*, and the Defendant then and there had and received in and on board of the said barge or vessel from the Plaintiff a large quantity, to wit, 114½ tons of lime of the Plaintiff of great value, to wit, of the value of 100*l*., to be by the Defendant carried and conveyed in and on board the said barge or vessel from a certain place, to wit, *Bewly Cliff* in the county of *Kent*, to the *Regent's Canal* in the county of *Middlesex*, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever excepted, for certain reasonable reward to be therefore paid by the Plaintiff to the Defendant: that the said barge or vessel afterwards, to wit, on, &c. at, &c. departed and set sail on the intended voyage, then and there having the said lime on board of the same to be carried and conveyed as aforesaid, except as aforesaid, and it thereby then and there became and was the duty of the Defendant to have carried and conveyed the said lime on board of the said barge or vessel from *Bewly Cliff* to the *Regent's Canal*, the act of God, and such other matters and things excepted, as were above mentioned to have

2. The law implies a duty on the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual course.

been

1830.

DAVIS v. GARRETT.

been excepted, by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same: but the Defendant, not regarding his duty in that behalf, but contriving and wrongfully intending to injure and prejudice the Plaintiff in that respect, did not carry or convey the said lime on board of the barge or vessel from *Bewly Cliff* aforesaid to the *Regent's Canal*, although not prevented by the acts, matters, or things excepted as aforesaid, or any of them, by and according to the direct, usual, and customary way and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same, but on the contrary thereof, afterwards, and before the arrival of the said barge or vessel as aforesaid at the *Regent's Canal*, the Defendant by one *John Town*, the master of the said barge or vessel, and the agent of the Defendant in that behalf, to wit, at, &c. without the knowledge and against the will of the Plaintiff, voluntarily and unnecessarily deviated and departed from and out of such usual and customary way, course, and passage, with the said barge or vessel so having the said lime on board of the same, to certain parts out of such usual and customary course and passage, to wit, to a certain place called the *East Swale*, and to a certain place called *Whitstable Bay*, and did then and there voluntarily and unnecessarily carry and navigate the said barge or vessel with the lime on board thereof as aforesaid to the said parts out of such usual and customary course and passage as aforesaid, and delay and detain the said last-mentioned barge or vessel with the lime on board thereof, for a long space of time, to wit, for the space of twenty-four hours then next following: and the said barge or vessel so having the said lime on board of the same, was by reason of such deviation and departure, and delay and detention

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1830.

DAVIS v. GARRETT.

out of such usual and customary course and passage, and before her arrival at the *Regent's Canal* aforesaid, to wit, on, &c. at, &c. exposed to and assailed by a great storm and great and heavy sea, and was thereby then and there wrecked, shattered, and broken, and by means thereof the said lime of the Plaintiff so on board the said barge or vessel as aforesaid, became and was injured, burnt, destroyed, and wholly lost to the Plaintiff, to wit, at, &c. whereby the Plaintiff lost divers great gains, profits, and emoluments, amounting to a large sum of money, to wit, the sum of 50*l.*, which he might and otherwise would have made thereby, to wit, at, &c.

At the trial before *Tindal* C. J., *London* sittings after *Michaelmas* term last, it appeared, that the master of the Defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration, without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of violent and tempestuous weather, the sea communicated with the lime which thereby became heated, and the barge caught fire; and the master was compelled, for the preservation of himself and the crew, to run the barge on shore, where both the lime and the barge were entirely lost.

A verdict having been found for the Plaintiff,

Taddy Serjt. obtained a rule *nisi* for a new trial, or to arrest the judgment, on the ground, first, that the deviation by the master of the barge was not a cause of the loss of the lime sufficiently proximate to entitle the Plaintiff to recover, inasmuch as the loss might have been occasioned by the same tempest if the barge had proceeded in her direct course; and, secondly, that the declaration contained no allegation of any undertaking on the part of the Defendant to carry the lime directly from

1830.

DAVIS v. GARRETT.

from *Bewly Cliff* to the *Regent's Canal*; an allegation which, it was contended, on the authority of *Max* v. *Roberts* (*a*), was essential to the Plaintiff's recovery.

Wilde Serjt. shewed cause. If the deviation was a breach of the master's duty, the loss is sufficiently proximate. But the deviation was a breach of duty, because in the contract to carry the Plaintiff's lime from *Bewly* to the *Regent's Canal*, it is an implied condition that, for the purpose of avoiding unnecessary delay, the lime shall be carried in the usual and direct course. The exception of perils of the seas and navigation, &c. applies only to perils incurred in the direct and usual course; and of perils encountered out of that course the Defendant must take on himself the responsibility. So, upon policies of insurance, if a loss happen during a deviation, it is not a loss within the meaning of the policy, and the underwriter is exonerated. So, if a party direct a horse to be led by a given road, and the conductor chooses to proceed by a different track, he will be responsible for any injury the horse may sustain.

With respect to the objection to the declaration, it may be admitted, for the purpose of argument, that the action is *ex quasi contractu*, and that it cannot be ascertained what was the duty of the Defendant, unless the contract be stated out of which that duty is alleged to arise. But there is no ground in this case for the objections taken to the declaration in *Max* v. *Roberts*. There the count stated that the defendants being owners of a ship at *Liverpool*, bound on a voyage from thence to *Waterford*, the plaintiff shipped goods on board, to be carried upon the said voyage by the defendants, and

(*a*) 12 *East*, 89.

1830.
DAVIS
v.
GARRETT.

to be delivered at *Waterford* to the plaintiff's assigns; whereupon the plaintiff insured the goods at and from *Liverpool* to *Waterford*; that it was the duty of the defendants, as such owners, to cause the ship to proceed on the voyage from *Liverpool* to *Waterford* without deviation; and alleged as a breach of such duty their causing the ship to deviate from the course of that voyage; after which she was lost with the goods; and the plaintiff, by reason of such deviation, lost his goods and the benefit of his policy, &c. It was held that the count could not be sustained for want of alleging that the goods were delivered to or received by the defendants for the purpose of carriage, or that they had notice of the shipment, from whence a promise or duty, founded upon an agreement to carry the goods, might be inferred; and also for want of an allegation that the defendants undertook to carry the goods directly to *Waterford* from *Liverpool*; for though the ship's ultimate destination might be *Waterford*, yet she might have been first destined to other places on a coasting voyage.

In this declaration it is distinctly alleged that the Defendant had received the lime in and on board of his barge to be by him carried and conveyed from *Bewly* to the *Regent's Canal*; and though it is not alleged that the Defendant undertook to carry the lime directly to the *Regent's Canal*, it is averred that it was his duty to carry it by and according to the direct usual and customary way, course, and passage, without any voluntary and unnecessary deviation and departure; and the breach is alleged in deviating unnecessarily from the usual and customary way.

Taddy. The cause assigned for the loss of the lime is too remote to entitle the Plaintiff to sue. In *jure causa*

1830.

DAVIS v. GARRETT.

causa proxima non remota spectatur; but here the alleged cause of the loss is many removes from the accident. The master deviated; by deviation he was exposed to a storm; the storm wetted the lime; the lime caught fire from the wetting; the barge caught fire from the lime; the barge sunk; and the lime perished. If the deviation be holden the cause of the loss here, there is no foretelling to what link in the chain of causation plaintiffs may ascend hereafter. But it cannot be averred with certainty that the deviation was even the remote cause of the loss; for the barge might have encountered, and probably would have encountered, the same storm if she had proceeded in a direct course.

At all events, the declaration should have alleged, on the part of the Defendant, an express undertaking to carry the lime by the direct course; for he might have shewn that no such undertaking existed; that he was accustomed, as carriers are wont, to call at places somewhat out of the direct course, for the convenience of his general business, and that the Plaintiff had consented to send his goods by such course as the carrier usually pursued. The only undertaking that can fairly be implied, on the part of the Defendant, is to convey the goods carefully and in reasonable time; he is not bound to pursue any particular course; but, in that respect, to consult his own convenience. If there were any express contract to bind him to a stricter performance, it ought to have been truly stated, that it might be seen what duty resulted from it. In the older forms of actions against a carrier, the expression is *suscepit*, which shows that the action against him is *ex contractu* (*a*), and governed by all the principles which apply to an action of contract. *Max* v. *Roberts*, therefore, is in point; and if the declaration there was ill

(*a*) *Per Denison* J. 1 *Wils.* 282.

1830.
DAVIS v. GARRETT.

because it did not aver an express undertaking by the defendant to carry the goods *directly* to *Waterford*, the present declaration is equally defective for not averring an undertaking to carry the goods directly to the *Regent's Canal*. In *Powell* v. *Layton* (*a*), *Mansfield* C. J. said, "The word *duty* is introduced into this declaration; but let us see what is meant by the defendant's duty. How did he undertake any duty, except by his agreement to carry and deliver the goods? The duty of a servant, and the duty of an officer, I understand, but the duty of a carrier I do not understand, otherwise than as that duty arises out of his contract."

Cur. adv. vult.

TINDAL C. J. There are two points for the determination of the Court upon this rule; first, whether the damage sustained by the Plaintiff was so proximate to the wrongful act of the Defendant as to form the subject of an action; and, secondly, whether the declaration is sufficient to support the judgment of the Court for the Plaintiff.

As to the first point, it appeared upon the evidence that the master of the Defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught fire, and the master was compelled for the preservation of himself and the crew to run the barge on shore, where both the lime and the barge were entirely lost.

Now the first objection on the part of the Defendant is not rested, as indeed it could not be rested, on the

(*a*) 2 *N. R.* 365.

parti-

particular circumstances which accompanied the destruction of the barge; for it is obvious, that the legal consequences must be the same, whether the loss was immediately, by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case.

But the objection taken is, that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course.

But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the Plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in *Parker* v. *James* (*a*), where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right and ordinary voyage.

The same answer might be attempted to an action against a Defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby

(*a*) 4 *Campb.* 112.

 ensued;

1830.

DAVIS v. GARRETT.

ensued; and yet the Defendant in that case would undoubtedly be liable.

But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could shew, not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.

Upon the objection taken in arrest of judgment, the Defendant relies on the authority of the case of *Max* v. *Roberts*. The first ground of objection upon which the judgment for the Defendant in that case was affirmed is entirely removed in the present case. For in this declaration it is distinctly alleged, that the Defendant had and received the lime in and on board of his barge to, be by him carried and conveyed on the voyage in question.

As to the second objection mentioned by the learned Lord, in giving the judgment in that case, viz. that there is no allegation in the declaration that there was an undertaking to carry *directly* to *Waterford*, it is to be observed, that this is mentioned as an additional ground for the judgment of the Court, after one, in which it may fairly be inferred from the language of the Chief Justice that all the Judges had agreed; and which first objection appears to us amply sufficient to support the judgment of the Court. We cannot, therefore, give to that second reason the same weight as if it were the only ground of the judgment of the Court. And at all events, we think there is a distinction between the language

language of this record and that of the case referred to. In the case cited, the allegation was, that it was the duty of the defendant to carry the goods directly to *Waterford*; but here the allegation is, "that it was his duty to carry the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation and departure."

The words *usual and customary* being added to the word *direct*, more particularly when the breach is alleged in "unnecessarily deviating from the usual and customary way," must be held to qualify the meaning of the word direct, and substantially to signify that the vessel should proceed in the course usually and customarily observed in that her voyage.

And we cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.

We therefore think the rule should be discharged, and that judgment should be given for the Plaintiff.

Rule discharged.

1830.

June 22.

LANCASTER and Another *v.* CHRISTOPHER HARRISON.

Defendant drew bills as surety for the acceptor *C. H.*, and it was provided by a deed, to which Plaintiff, the holder of the bills, as well as the Defendant, was a party, that he should not sue Defendant on the bills till *C. H.*'s effects should have been sold, and the proceeds applied in discharge of the bills.

C. H.'s effects were seized and sold under a commission of bankruptcy, the trustee to whom they had been conveyed by the deed in question having, with the knowledge and assent of the Defendant, omitted to take possession of them in time:

Held, that the Plaintiff was not barred from suing the Defendant on the bills.

THIS was an action on several bills of exchange drawn by the Defendant, accepted by his brother *Charles Harrison*, and indorsed to the Plaintiffs.

Charles Harrison being considerably indebted to the Plaintiffs, by indenture made the 20th of *February* 1828, between himself of the first part, the Defendant of the second, the Plaintiffs of the third, and *Thomas Borrett* of the fourth, (reciting that the Plaintiffs had agreed to discount for *Charles Harrison* bills of exchange to the amount of 700*l.* drawn by the Defendant upon, and accepted by *Charles Harrison*; that *Charles Harrison* owed the Plaintiffs 500*l.* for wine; and that he had agreed to assign the lease of a house in *Russell Street*, with the furniture, fixtures, and other effects in and about the same, for the purpose of securing to the Plaintiffs the payment of the 500*l.*, of the bills of exchange which had been discounted, and any other drafts or bills to be thereafter paid, so as the monies recoverable under the security should not exceed 1000*l.*) assigned to *Thomas Borrett* the lease of the house in *Russell Street*, and all the furniture, fixtures, and effects therein, upon trust, that at the request of the Plaintiffs, *Borrett* should sell the lease and furniture by public auction or private contract, and apply the proceeds, first, in defraying the expenses of executing the trust, and then in paying and satisfying the Plaintiffs the 500*l.* due for wine, the 700*l.* due on the bills of exchange, and the sum to become

due

due on any other drafts or bills which the Plaintiffs might thereafter discount or pay for *Charles Harrison*, with interest on the same; and it was provided, that the premises thereby assigned should be sold or offered for sale, and the produce thereof, if sold, be applied in the manner and for the purposes specified in the deed, before any proceedings should be commenced by the Plaintiffs, or any subsequent indorsees of the bills of exchange, against the said *Christopher Harrison*, his executors, &c. to compel payment of the bills, or any of them, and that no proceedings should be had on the bills unless no person should be willing to purchase the premises, or the produce, after such deductions as aforesaid, should be insufficient to discharge the amount of the bills and interest, and expenses thereon.

The Defendant knew that his brother was considerably embarrassed, but he was allowed to remain in possession of the premises. His affairs becoming more desperate, the Plaintiffs, in *January* 1829, seized the effects in the house under an execution in an action against him on one of the bills he had accepted. At his earnest request, however, the sale was postponed, and the officer continued in possession till the 15th of *April* following, when the goods were claimed under a commission of bankruptcy issued against him in the interval, and the Plaintiffs withdrew their execution.

It appeared by a letter from the Defendant to the Plaintiffs, dated *April* 20th, 1829, that he was aware of all these circumstances from the beginning, and also that three loads of furniture had been removed from the premises, on the assertion that they belonged to a lady who lodged in the house, though the Defendant expressed his belief that she was entitled to no more than one load.

After the commission of bankrupt had issued, *Borrett* attempted to take possession of the premises, but in vain.

The

1830.

LANCASTER v. HARRISON.

The goods and fixtures were sold by the assignees under the commission for 25*l.*, and the lease for 10*l.* The 10*l.* they paid over to the Plaintiffs, and retained the rest; whereupon the Plaintiffs commenced this action against the Defendant as drawer of the bills to the amount of 900*l.* and upwards.

At the trial before *Tindal* C. J., *London* sittings after last *Hilary* term, it was objected on the part of the Defendant, that, according to the provision of the deed of *February* 20. 1828, the Plaintiffs had no right to sue the Defendant on the bills till the fixtures and furniture had been put up for sale by *Borrett*, and the proceeds of them had been paid to the Plaintiffs; and that the sale by the assignees under the commission of bankrupt, and the payment of the proceeds to *Charles Harrison's* creditors at large, was no compliance with the terms of that proviso.

The Chief Justice, however, thought that this was no answer to the action in a court of law, and that the Defendant's remedy was in a court of equity, if there had been any fault in his trustee.

A verdict, therefore, was taken for the Plaintiffs for 941*l.* 18*s.* 6*d.*, with leave for the Defendant to move to enter a nonsuit instead.

Wilde Serjt. having accordingly obtained a rule *nisi* to that effect, on the ground urged at the trial,

Taddy Serjt. shewed cause. (*Goulburn* Serjt. was with him.) The proviso in the deed does not amount to a general covenant not to sue: it could not be pleaded in bar as such, or as a release; and if so, although it may afford ground for a cross action, it is no defence to the present. But the proviso is not confined to a sale by *Borrett*, and the object of it was merely to prevent the Defendant from being called on till it should have been

been ascertained that *Charles Harrison* was without funds to defray his debts; and that has been established by the actual sale of his effects as required.

It was the Defendant's own laches that *Borrett* did not take possession of the effects, and dispose of them for the benefit of the Defendant as soon as the deed of *February* 1828 was executed. From his letter of *April* 1829, it is manifest he knew and assented to all that was going on, with a view to serve his brother; and he cannot now object that that has not been done, which has been omitted through his own indulgence or neglect.

Wilde. The Defendant is only a surety, and is entitled to the strict observance of the proviso in the deed. That proviso was introduced for his benefit, and not for the benefit of *Charles Harrison*'s creditors at large; and it expressly stipulated, that the Defendant shall not be proceeded against, not only till *Charles Harrison*'s effects have been sold, but till the proceeds have been paid to the Plaintiffs, and found insufficient to satisfy the bills. There has been no performance of this part of the condition; for the Plaintiffs received only 10*l.*, the proceeds of the lease, and nothing in respect of the fixtures or furniture. Till the proceeds of the latter have been found insufficient, the action against the Defendant is premature, as in *Tatlock* v. *Smith.* (*a*) The sale contemplated by the proviso was a sale by *Borrett* for the benefit of the Plaintiffs, and not a sale under a commission of bankrupt for the benefit of creditors at large. The Plaintiffs should have called on *Borrett* to sell. The neglect is in them.

TINDAL C. J. The question in the cause depends on the construction of the proviso in the deed of *February*

(*a*) 6 *Bingh.* 339.

20th,

1830.

LANCASTER v. HARRISON.

20th, 1828. It appears that *Christopher Harrison* is only a surety: he is a party to the deed; and by the proviso at the end it is stipulated that the premises thereby assigned shall be sold, or offered for sale, and the produce thereof, if sold, be applied in the manner and for the purposes specified in the deed, before any proceedings shall be commenced by the Plaintiffs, or any subsequent indorsers of the bills of exchange, against the said *Christopher Harrison*, his executors, &c. to compel payment of the bills, or any of them, and that no proceedings shall be had on the bills unless no person shall be willing to purchase the premises, or the produce, after such deductions as aforesaid, shall be insufficient to discharge the amount of the bills and interest and expenses thereon: and it has been contended that this proviso operates as an agreement on the part of the Plaintiffs not to sue the Defendant upon the bills, till all the particulars specified in the proviso have been complied with.

If we take the proviso according to the letter, it has been complied with. For the Defendant has not been sued till the premises have been put up for sale, and the produce has been found insufficient to satisfy the Plaintiffs' demand. But it is contended, that the sale which has taken place is not such a sale as was contemplated by the agreement; that the sale ought to have been a beneficial sale by *Borrett*, the trustee in the deed, for the sole purpose of discharging the bills, instead of a compulsory sale by the assignees of *Charles Harrison*, who have carried off all the proceeds to be distributed among his creditors. That may be a ground of complaint against *Borrett*, who was a trustee for all parties for the purposes expressed in the deed, but it is no answer in law to an action on the bills. If the Defendant have yet any remedy on this deed, it must be by application to another court to enjoin the Plaintiffs not to proceed.

GASELEE

1830.

LANCASTER v. HARRISON.

GASELEE J. (a) I am satisfied that there is no ground for making absolute this rule to enter a nonsuit, because the agreement entered into by the Plaintiffs does not amount to a general covenant not to sue, and, therefore, could not be pleaded as a release. In *Dean* v. *Newhall* (b) it was holden, that if the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. And a passage is cited with the concurrence of Lord *Kenyon*, from 12 *Mod.* 351., that "if *A.* and *B.* be jointly and severally bound to *C.* in a sum certain, and *C.* covenant with *A.* not to sue him, that shall not be a release, but a covenant; because he covenants only not to sue *A.*, but does not covenant not to sue *B.*; for the covenant is not a release in its nature, but only by construction to avoid circuity of action."

I do not concur in thinking that the Defendant is to blame for the trustee's omission to sell, but I am satisfied there is no ground for entering a nonsuit.

BOSANQUET J. I am of opinion that the terms of the proviso in the deed offered no defence to this action. It is an agreement not to proceed against the Defendant under certain circumstances, but does not amount to a general covenant not to sue, and could not be pleaded as a release.

If there be any thing wrong in the conduct of the trustee, that must be the ground of application to another court.

Rule discharged.

(a) *Park* J. was at Chambers.

(b) 8 *T. R.* 168.

1830.

June 23.

COCKBURN *v.* LING.

Where a Defendant was allowed time to answer Plaintiff's affidavit impeaching the sufficiency of Defendant's bail, he was not allowed to put in fresh bail instead of answering the affidavit, although his time for putting in bail had not expired, nor any attachment been issued against the sheriff.

THIS was a country cause in which bail were to be justified by affidavit: the affidavits were sent up on the 14th of this month, although the Defendant had till the 26th to put in bail above. On the 18th the Plaintiff having put in affidavits which impeached the sufficiency of the proposed bail, the Defendant was allowed till this day, the 23d, to answer the matter alleged, without prejudice to the Plaintiff's proceedings.

The Defendant, however, instead of answering the affidavits, now proposed to put in fresh bail, whom

Andrews Serjt. moved to reject.

Stephen Serjt. contended, that the Defendant was entitled to put in fresh bail till the 26th, especially as the sheriff had not been ruled to bring in the body, and was not yet liable to any attachment. The rejection of the bail now offered would only cast upon the Defendant the unnecessary expense of discharging an attachment against the sheriff. But

The Court said the Defendant was in the same situation as if his bail had been in the box and rejected upon examination. Time had been allowed him, as an indulgence, to answer the Plaintiff's affidavit: he was bound to apply the time to that purpose, and not to the purpose of procuring other bail, by which in effect he admitted he had no answer to the Plaintiff's affidavit. That although it was to be regretted the Defendant had exposed himself to the expense of an attachment, the rule of the Court must be adhered to in order to induce parties to put in sufficient bail in time.

ALCOCK v. COOK.

June 23.

THIS was an action of trover, to try the right to wreck on a portion of the coast of *Lincolnshire*. The Plaintiff having laid his *venue* in *London*,

The Court will not, in a transitory action, change the *venue* on account of the expense of trying the cause in the county where the *venue* is laid, unless the expense of trying it there greatly preponderates.

Adams Serjt. obtained a rule *nisi*, to remove the *venue* to *Lincolnshire*, on the ground that almost all the witnesses conversant with the matter resided in that county; that several of them were exceedingly aged; that one in particular, who had given his testimony upon a former trial, could not be removed without danger, and that the expense of trying the cause in *London* would be enormous.

Wilde Serjt. shewed cause on affidavits, which stated that the Plaintiff's case rested mainly on documentary evidence, which might be produced in *London* at little expense, but which it would be both difficult and expensive to prove by proper witnesses in *Lincolnshire*.

Adams offered to make admissions as to sundry of the documents.

Sed per Curiam. The general rule is, that in transitory actions the Plaintiff has a right to lay his *venue* where he pleases, and the courts only interfere on special grounds, as where it is not likely that an impartial trial can be had, or the expense of witnesses greatly preponderates on one side. The present is a mixed case; and where the expense will be great on both sides, we cannot upon every occasion undertake to try the balance of inconvenience.

We,

1830.

ALCOCK v. COOK.

We, therefore, discharge the rule, but think it right to impose upon the Plaintiff the terms of permitting the evidence of the old witness, who cannot be removed, to be read from the Judge's notes of the former trial.

Rule discharged accordingly.

June 28.

CRAVEN and Others, Assignees of WILLIAM and BENJAMIN ALRED, Bankrupts, *v.* EDMONDSON.

A payment by a partner who has committed an act of bankruptcy, of a partnership debt due before the bankruptcy, to a creditor who has notice of the act of bankruptcy, is not protected by *s.* 82. of 6 *G.* 4. *c.* 16.

ASSUMPSIT. The declaration contained counts, 1st, for money had and received to the use of the bankrupts; 2dly, to the use of the Plaintiffs, as assignees of the bankrupts; and, 3dly, to the use of *Benjamin Alred* jointly with the Plaintiffs, as assignees of *William Alred*.

At the trial, last *York* assizes, it appeared that the Defendant had supplied the bankrupts on their joint account, with wool to the amount of 92*l.*, and pressed for payment; whereupon the debt was, in the month of *October* 1829, settled by *William Alred*, who had just before committed an act of bankruptcy, of which the Defendant had notice. *Benjamin Alred* did not commit any act of bankruptcy till some days after.

The commission was dated the 2d *November* 1829.

A verdict having been found for the Plaintiffs,

Jones Serjt., pursuant to leave reserved at the trial, moved to set it aside, and enter a nonsuit instead, on the ground that the payment having been made before the assignees' title to the joint property of the bankrupts was completed, they were not in a situation to sue for the

1830.

CRAVEN v. EDMONDSON.

the amount; and that at all events the payment was protected by the eighty-second section of 6 *G.* 4. *c.* 16., which enacts, that payments *bonâ fide* made by any bankrupt before the date and issuing of the commission, shall be deemed valid notwithstanding any prior act of bankruptcy, provided the person dealing with the bankrupt had not at the time of such payment notice of any act of bankruptcy by *such* bankrupt committed.

The payment having been made to the Defendant in respect of a debt due from *both* the bankrupts, the notice of an act of bankruptcy, in order to invalidate the payment, ought to be notice of an act committed by both *such* bankrupts.

A rule *nisi* was granted, against which

Wilde Serjt. shewed cause. The action lies, and the declaration is sufficient; at all events, the set of counts which alleges the money to have been received to the use of *Benjamin* and the assignees of *William*. *Smith* v. *Goddard*. (*a*) And notice of the act of bankruptcy by *William*, sufficiently brings this case within the proviso of the eighty-second section of 6 *G.* 4.; for *William* being bankrupt, the assignees were in his place partners with *Benjamin*, and *William* was without authority to dispose of the partnership funds. *Thomason* v. *Frere* (*b*), *Graham* v. *Robertson*. (*c*) In *Smith* v. *Goddard* the payment was made by an agent of the solvent partner, and, therefore, by one who had authority; so likewise in *Fox* v. *Hanbury*. (*d*)

Jones. The authority of a partner is not, by his committing an act of bankruptcy, rescinded as to engagements

(*a*) 3 *B.* & *P.* 469.
(*b*) 10 *East*, 418.
(*c*) 2 *T. R.* 282.
(*d*) *Cowp.* 445.

1830.

CRAVEN v. EDMONDSON.

gagements and debts incurred before the act of bankruptcy. He loses only his authority to enter into new engagements. The solvent partner retains his authority; and, as to past engagements, may continue to act as agent for the bankrupt partner: *Fox* v. *Hanbury*: if so, the bankrupt partner is, as to such engagements, agent also for the solvent partner; otherwise their rights and responsibilities are not reciprocal. In *Harvey* v. *Crickett* (*a*), a payment made by the bankers of a firm, after one of the firm had committed an act of bankruptcy, was holden a valid payment; though the bankers must have been agents as well for the bankrupt as the solvent partner. And in *Lacy* v. *Woolcot* (*b*), a bill of exchange, accepted for a firm by one of the partners after he had committed an act of bankruptcy, was holden an available instrument in the hands of an innocent indorsee. Therefore it may be contended, that the eighty-second section applies only to the case of sole traders; a partner who has committed an act of bankruptcy being, as to past engagements, agent for the solvent partner, and it being indifferent by what hand such solvent partner makes the payment.

TINDAL C. J. This was an action to recover a sum of money paid by *William Alred* after an act of bankruptcy, being the amount of a debt due to the Defendant from *William Alred* and his partner *Benjamin*, who remained solvent. And the question is, Whether, upon proof that the Defendant knew of the act of bankruptcy, this sum can be recovered by the assignees of the two partners. If there had been no partner, the case would have fallen directly within the eighty-second section of 6 *G.* 4. *c.* 16., which, after enacting—"That all payments really and *bonâ fide* made, or which shall hereafter be

(*a*) 5 *M.* & *S.* 337. (*b*) 2 *D.* & *R.* 458.

made

1830.

CRAVEN v. EDMONDSON.

made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bonâ fide* made, or which shall hereafter be made to any bankrupt before the issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt;—" goes on,—"provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

It has been contended, that this section applies only to sole traders, and not to the case of a firm, where any of the partners continue solvent. But no authority has been cited for such a position: and in whom was the property in the monies vested at the moment of the payment? *William* having committed an act of bankruptcy, one moiety of it belonged to his assignees, the other moiety to *Benjamin*. By what right, then, could *William* make over the moiety of *Benjamin?* It has been contended he was the agent of *Benjamin*. But the act of bankruptcy, which made his assignees and *Benjamin* tenants in common, dissolved the agency as to the property of such tenancy in common. In some cases, and for some purposes, particularly in favour of a party who has no notice of the act of bankruptcy, the agency may, perhaps, be said to continue; as under the circumstances stated in *Woolcot* v. *Lacy:* but here the Defendant had notice of the act of bankruptcy; and he must have known that the agency of *William* was destroyed, or capable of being destroyed, by a subsequent com-

1830.

CRAVEN v. ERSKINSON.

mission. The money, therefore, belongs to the assignees, and this rule must be discharged.

PARK J. and GASELEE J. concurred.

BOSANQUET J. I am of the same opinion. From the time of the act of bankruptcy, *William* ceased to have any interest in the partnership funds, and could not make any payment for *Benjamin*.

The payment by *William* on his own account is not protected, because the party had notice of his bankruptcy. And with respect to *Benjamin*, the payment was not made by him, nor on his behalf, for the reason already given.

Rule discharged.

June 29.

GOULD, Assignee of SERJEANT, a Bankrupt, *v.* SHOYER.

A purchaser of property under a commission of bankrupt which is afterwards superseded by a creditor, is not protected by *s.* 87. of 6 *G.* 4. *c.* 16. from a claim at the suit of the assignees under a subsequent commission.

TROVER for a lease.

The Defendant had purchased the lease from the assignees of *Shoyer*, under a commission of bankrupt sued out against him *June* 27. 1827. In the *November* following, one *Martha Gale* presented a petition to supersede this commission, which was accordingly superseded at her instance, the bankrupt himself taking no steps in the business.

The Plaintiff in the present action was assignee under a subsequent commission.

At the trial before *Bosanquet* J., last *Somerset* assizes, a verdict was found for the Plaintiff, with leave for the Defendant to move to set it aside and enter a nonsuit, if the Defendant's purchase were protected under the 6 *G.* 4.

1830.

GOULD v. SHOVER.

6 G. 4. c. 16. s. 87. which enacts "That no title to any real or personal estate sold under any commission, or under any order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out of the commission, or on any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same within twelve calendar months from the issuing thereof."

Merewether Serjt. obtained a rule *nisi* on that and other grounds, which it is not material to state here.

Wilde and *Stephen* Serjts. shewed cause. The eighty-seventh section applies only to proceedings by the bankrupt himself, and was intended to prevent him from impeaching titles, unless he commences proceedings on a *supersedeas* within twelve months from the date of his commission.

The assignees on the second commission do not claim *under* the bankrupt, strictly speaking, but adversely to him, by operation of law — the commission being a kind of statutory execution. *Doe* v. *Bevan.* (*a*) They claim in the *post*, not in the *per*. The object was to protect purchasers under an existing commission, not, to make available a commission superseded; otherwise *bonâ fide* creditors might be injured by sales under a fraudulent commission, which the bankrupt might collusively abstain from impeaching. If the legislature had designed to estop the creditors as well as the bankrupt from impeaching proceedings, such an intention might have been indicated by the insertion of the single word *creditors*. But *ss.* 92., 94., and 78. contain provisions incompatible with the supposition of any such intention.

(*a*) 3 *M.* & *S.* 153.

1830.

GOULD v. SHOYER.

Merewether. In common parlance, assignees claim under a bankrupt, and it must be presumed that the legislature employs words in their ordinary sense, and not with a confined and technical meaning. It will be a great hardship on purchasers, to invest money on the sanction of a commission, and to be turned out of possession, perhaps, after expensive improvements. That is a hardship which the Court of Chancery has always interfered to prevent; *Ex parte Milner* (*a*); and it can scarcely be supposed the legislature would sanction a mischief which a court of equity would redress. It is impossible for a purchaser to know whether a commission will turn out to be valid or not, and the eighty-seventh section will be almost nugatory if it be not held to protect every purchase under a commission. A contrary decision must have a very mischievous effect upon sales under commissions, by deterring bidders, and lowering the price of the property to be sold. The property having been paid for, the creditors are not injured: the evils which may possibly arise from occasional fraud in bankrupts are of a less serious nature, and can never be completely guarded against. Therefore, by *s.* 92., depositions are made conclusive in all cases, unless the commission be disputed within a certain time.

Cur. adv. vult.

TINDAL C. J. The only point upon which the Court entertained any doubt, was that which was last urged on the part of the Defendant, viz. whether the Defendant, who had purchased the lease from the assignees of the bankrupt under a commission issued in 1827, which was afterwards superseded on the petition of a creditor, was protected, under the eighty-seventh section of the bankrupt act, against the present action, brought to re-

(*a*) 19 *Ves.* 204.

cover

cover the same lease, by the assignees under a second commission.

The eighty-seventh section contains a provision entirely new to the bankrupt law; in order, therefore, to judge of the extent and operation of that section, it should be considered what were the mischiefs at that time experienced.

By superseding a commission, every thing done under it was considered to be void whilst the writ of *supersedeas* remained in force; all titles to real or personal property purchased from the assignees were defeated; all payments made to, and all acts done by, them were held to be void.

But as no *supersedeas* could be obtained except by application to the great seal, it was in the discretion of the Chancellor to refuse to grant a *supersedeas*, either at the prayer of the bankrupt, or even with the consent of all the creditors, where *bonâ fide* purchasers were in possession of any part of the bankrupt's property, by purchase under the commission, unless the bankrupt elected to confirm the purchases under which they claimed. *Ex parte Milner.* (*a*) *Buck.* 67.

No real or substantial injury could therefore be effected by a writ of *supersedeas*; because notice of the application must be given to all parties concerned; the Chancellor would hear all whose interests were affected; he would direct an issue where he felt doubt as to the propriety of the application, and would only grant the application upon terms which would insure the just rights of all.

But there was another mode in which the bankrupt might question the titles of others, without any application to the Chancellor; and that was, by bringing an action at law, and by proving, in the language of the

(*a*) 19 *Ves.* 204.

1830.

GOULD v. SHOYER.

eighty-seventh section, "a defect in the suing out of the commission, or in any of the proceedings under the same;" in which case *bonâ fide* purchasers might be deprived of their purchases without any remedy whatever.

In order to prevent this mischief, and this only, as it appears to us, was the eighty-seventh section framed; the object of which was, to take away the power of the bankrupt to question titles, unless where he commenced proceedings to supersede the commission, and duly prosecuted the same within twelve months; thus at once limiting the bankrupt to the period of a year within which he must apply for the *supersedeas*, and restraining him to that course in which it was well known the Lord Chancellor would provide that he should not question the titles of those who were *bonâ fide* purchasers under the commission.

The eighty-seventh section, therefore, appears to us to have been framed for a purpose quite different from that of operating as a restraint on the assignees under a second commission, and it contains no provision to that effect. There can, therefore, be no reason for extending the words, "claiming under the bankrupt," beyond their strict meaning, that is, persons claiming as purchasers, devisees, heirs, or personal representatives; the assignees not claiming in strictness *under* the bankrupt, but adversely to him, and by operation of law. If the Defendant had any just title to protection, he might have appeared before the great seal when the creditor obtained the *supersedeas* of the former commission, and no doubt he would have received protection from this action.

Rule discharged.

1830.

MILES *v.* CATTLE and Another.

June 28.

CASE against a carrier for negligence.

The first count of the declaration stated, that the Defendants, before and at the time of committing the grievances thereinafter next mentioned, were owners and proprietors of a certain common stage-coach for the carriage and conveyance of passengers and their luggage from *Stockton* to *York* for hire and reward to them the Defendants in that behalf, to wit, at, &c.: and the Defendants, being such owners and proprietors, thereupon, theretofore, to wit, on, &c. at, &c. the Plaintiff, at the special instance and request of the Defendants, became and was a passenger in the same coach, to be safely and securely carried and conveyed thereby, together with his luggage, from *Stockton* to *York*, for a certain fee and reward to the Defendants in that behalf: and the Defendants then and there received the Plaintiff as such passenger, together with his luggage, to wit, a certain bag containing divers goods and chattels, to wit, ten coats, &c. of great value, to wit, of the value of 50*l.*, and a certain note of the Governor and Company of the Bank of *England*, commonly called a bank-note, for the payment of 50*l.*, and of the value of 50*l.* of the said Plaintiff: and thereupon it then and there became and was the duty of the Defendants to use due and proper care that the Plaintiff and his luggage should be safely and securely carried and conveyed by and upon the said coach from *Stockton* to *York*: yet the Defendants, not regarding their duty in that behalf, did not use due and proper care that the Plaintiff and his luggage should be safely and securely carried and conveyed by and

Plaintiff received a parcel from *G.* to book for *London* at the office of Defendants, common carriers. Plaintiff, instead of obeying his instructions, put the parcel into his bag, intending to take it to *London* himself. The Defendants having lost the bag, held, that the Plaintiff could not recover damages from them in respect of the parcel.

1830.

MILES v. CATTLE.

and upon the said coach from *Stockton* to *York*, but wholly neglected so to do; and so carelessly and negligently conducted themselves with respect to the said luggage of the Plaintiff, that the same, by and through the carelessness and negligence of the Defendants in that behalf, became and was totally lost to the Plaintiff, to wit, at, &c. The second count stated, that the Plaintiff, at the request of the Defendants, had delivered to them a bag containing, (as before,) to be carried to *York*, which it was the Defendants' duty to take care of, and yet it was lost through their negligence. The third and fourth were not materially different; and the fifth alleged that the Defendants were keepers of a certain coach-office for the reception and safe custody of the luggage of passengers for hire, coming to or going from the coach-office by any coach for the conveyance of passengers for hire whereof the Defendants were proprietors; that the Plaintiff afterwards, to wit, on, &c. came to the coach-office as a passenger for hire from *Stockton* in and by a certain coach for the conveyance of passengers for hire, whereof the Defendants then were proprietors, with certain luggage of him the Plaintiff, to wit, a certain other bag containing, (as before,) and thereupon, then and there, at the special instance and request of the Defendants, caused the last-mentioned bag, with the contents thereof, to be placed in the coach-office, to be safely and securely kept for the Plaintiff by the Defendants, who then and there received the same for the purpose aforesaid; whereupon it then and there became and was the duty of the Defendants to use due and proper care in the keeping and taking care of the last-mentioned bag of the Plaintiff, with the contents thereof: yet the Defendants, not regarding their duty in that behalf, took such bad care of the last-mentioned bag, and contents thereof, and so carelessly and negligently conducted themselves in that behalf,

behalf, that the last-mentioned bag, with the contents thereof, afterwards, to wit, on, &c. by and through the carelessness and negligence of the Defendants, became and was wholly lost to the Plaintiff, to wit, at, &c.

At the trial before *Park* J., *York Lent* assizes, it appeared that the Defendants were proprietors of a coach running between *Stockton* and *York*. The Plaintiff, having occasion to go to *London*, took a place in the coach from *Stockton* to *York*, intending when at *York* to proceed by the mail to *London*. He had with him in the coach a cloak, and a bag, labelled, "*T. Miles*, passenger," containing clothes worth about 15*l*. Previously to his setting out from *Stockton*, one *Garbut* delivered to him a parcel containing a 50*l*. bank-note, addressed to an attorney residing in *London*, which parcel *Garbut* desired the Plaintiff to book at the Defendant's office at *Stockton*, and forward by the Defendants to *London*. The Plaintiff, instead of doing this, put the parcel into his own bag, intending to convey it to *London* himself. The carriage of the parcel, if it had been sent by the Defendants, would have cost 4*s*. 6*d*. When the Plaintiff arrived at *York* he got off the Defendants' coach without attending to his luggage, walked away, and was absent about two hours. On his return to the office at which the Defendants' coach had stopped and had been unloaded by the Defendants' porter, the Plaintiff found his cloak, but was never able to obtain any tidings of his bag.

A verdict was found for the Plaintiff for 15*l*., with leave for him to move to increase it to 65*l*., if under the circumstances the Court should think him entitled to recover in respect of the 50*l*. note.

Wilde Serjt. accordingly obtained a rule *nisi* to that effect, and

Cross

1830.

MILES v. CATTLE.

Cross Serjt. obtained a rule *nisi* for a new trial, provided the Court should make the first rule absolute.

Cross now shewed cause against the rule for increasing the damages, and proposed to shew that the Plaintiff ought not to recover the 15*l*., much less the 65*l*., the bag having been in his own custody as a passenger, and having been lost by his own carelessness; but the Court confined him upon this rule to the question on the 50*l*. note; as to which, he objected to the Plaintiff's recovery, first, that he had no property in the note, and that the Defendants, after paying him, might be called on to pay *Garbut*; and, secondly, that the note was lost by the Plaintiff's wrongful act, and a violation of trust injurious to the Defendants. It would be doubly hard if the Plaintiff should be permitted, after depriving the Defendants of the sum to which they would have been entitled for the carriage of the parcel, to charge them with a loss which probably would never have occurred had the parcel been placed at once, as *Garbut* desired, in the care of the Defendants. Besides, the Plaintiff never disclosed to the Defendants that he had property of such value in his bag, as he ought to have done. *Batson* v. *Donovan*. (*a*)

Wilde. A bailee who receives property on a contract beneficial to himself, cannot impeach the property of the bailor; he is in the like case with a tenant, who, after consenting to take from a landlord, is estopped to dispute the landlord's title. The Plaintiff had at all events a special property in the note, in respect of which he was entitled to recover; as the borrower of a horse would be entitled to recover in trover against any who should take the horse from him. It is doubtful

(*a*) 4 *B. & A.* 21.

whether

whether *Garbut* could recover against the Defendants, as there was no contract between him and them; the Plaintiff is responsible to *Garbut*, and ought, therefore, to have a remedy over against the Defendants. If entitled to recover at all, he is entitled to recover the whole value proved to have been in the bag.

TINDAL C. J. I am of opinion this rule ought to be discharged. The jury were at liberty to enquire what amount of damage the Plaintiff had sustained; and in order to recover, the Plaintiff must shew that he had an absolute or a special property in the parcel lost. That he was not the owner is admitted; and the question is, whether at the time of the loss he had it on any bailment. The evidence is, that the parcel was delivered to him, not, for the purpose of carrying it to *London* himself, but, of booking it at the Defendants' office in *Stockton*. In violation of that trust, the Plaintiff thought proper not to deliver the parcel to the Defendants, but to deposit it in his own bag; thereby depriving *Garbut* of any remedy he might have had against the Defendants in case the parcel had been lost by them, and becoming himself a wrongdoer towards the Defendants, by depriving them of the sum they would otherwise have earned for the carriage of the parcel. Does the loss of this parcel, then, give the Plaintiff any ground to say he has sustained damage at the hands of the Defendants? I think it does not; and therefore this rule must be discharged. The other, which was only granted conditionally in case this should be made absolute, falls also to the ground.

PARK J. The jury, in limiting their verdict to 15*l.*, proceeded on the principle which has been stated by my Lord Chief Justice, and in which I entirely agree. I anxiously wish to guard against any notion, that a bailee

1830.

MILES v. CATTLE.

bailee is permitted to enter into questions of title with his bailor. But the Plaintiff had only a very limited trust in respect of the parcel in question; and if he had discharged his duty, should have booked it at the Defendants' office. In breach of that duty, perhaps from intended kindness, he puts it in his own bag, and injures the Defendants by depriving them of the carriage to which they would have been entitled if he had pursued the instructions of his principal. I am of opinion, therefore, that this rule should be discharged.

GASELEE J. I am satisfied with the verdict as it stands.

BOSANQUET J. I agree that it is not competent to a carrier to dispute the title of a party who delivers goods to him. But here the Plaintiff conducted himself amiss towards the Defendants; the loss was occasioned by his own misfeasance, and he cannot be said to have sustained damage at the hands of the Defendants.

Rule discharged.

1830.

WARD and SOMES *v.* SMITH.

June 25.

LIBEL.

A mercantile firm, of which the Defendant was a member, had, in conjunction with two other firms, offered to supply the navy board by contract with 36,000 loads of *African* timber at 9*l.* 10*s.* a load.

The Plaintiffs offered to supply it at 9*l.* 9*s.*, and obtained the contract; but being new in the trade, agreed that the contract should be equally divided between themselves on the one part, and the Defendant and his friends on the other, upon condition of the Defendant and his friends supplying the Plaintiffs with half the timber, to be delivered at *Sierra Leone* at 2*l.* 17*s.* 6*d.* a load, subject to the dock-yard receipt and measurement, and according to the terms of the contract.

The Defendant and his friends, however, having ascertained that under the Plaintiffs' contract some alteration would probably be made in the usual mode of measurement, which would render the contract less beneficial to the contractors, rescinded their agreement with the Plaintiffs.

Had that agreement been acted on, the Defendant and his friends would have supplied the timber through the firm of *Weston* and *Clouston*, at *Sierra Leone*, of which firm the Defendant was the sole correspondent

1. Defendant being a competitor with Plaintiffs for a contract with the navy board for *African* timber, the Plaintiffs obtained the contract; the Defendant then agreed to supply the Plaintiffs with a portion of the timber, and made no objection to taking their bills in payment; this agreement, however, having been rescinded on a disagreement as to the terms, the Defendant wrote to a merchant at *Sierra Leone*, who was to supply the timber in question, and of whom the Defendant was a creditor and the sole correspondent in *London*, a letter, reflecting deeply on Plaintiffs' mercantile character, and putting the merchant on his guard against them, for which, as a libel, the Plaintiffs brought an action. The jury having found for the Defendant, the Court granted a new trial.

2. The transmission of the letter by Defendant to his correspondent held a sufficient publication by Defendant.

and

1830.

WARD v. SMITH.

and consignee in *London*, and a creditor to a considerable amount.

When the Plaintiffs' agent applied to the Defendant, in the first instance, for a supply of timber, the Defendant made no objection to entering into an engagement with the Plaintiffs; said he had authority from *Clouston* to treat with them; and upon being told the payment should be by approved bills, or the Plaintiffs' own bills, said, "I dare say they are good enough."

The agreement, however, having been rescinded for the reasons before stated, the Defendant addressed and transmitted to Messrs. *Weston* and *Clouston*, at *Sierra Leone*, the following letter: —

"*London*, 17th *September* 1828.

Dear Sirs, — The annexed is a copy of our last, since when we have yours of the 21st of *June*, covering bill of lading for 272 logs of timber per *Deveron*, with bill on Mr. *Laing* 526*l.*; he has accepted it for 350*l.*, two thirds the amount of the timber; and the remainder is to be paid in cash on the delivery of the cargo as per contract, of which, we believe, you were furnished with a copy. The navy board have come to the determination, which they state to be unalterable, that the timber shall be measured strictly in conformity to the drawings and models referred to in the contract, and thereby making it, as we have before explained to you, perfectly square timber. We of course have nothing to do with it on those terms. The contractors, however, are determined to go on, and for that purpose have appointed Mr. *Barber* their agent, to purchase the timber necessary to fulfil it, authorising him, we presume, by powers of attorney or otherwise, to draw bills on them for the cargoes as they are shipped. We confess ourselves at a loss what advice to give you under these circumstances. For the contractors are notorious for every thing but fair

fair dealing, and a strict adherence to their engagements; and, should any dispute or difficulty arise between them and the board, as to the description and measurement of the timber, they would with little ceremony turn round and set Mr. *Barber* and his bills at defiance: however, the better plan probably will be to act with Mr. *Macauley* and Mr. *M'Cormick*, and on no account to make an engagement to extend beyond the present season. Let the timber be described in the same way as the contracts we have heretofore made for you, and subject to the customs' measure, obtaining Mr. *Barber*'s approbation as to quality and dimensions, although that would, we suspect, have little weight with them. Two pound seventeen shillings and sixpence or three pounds per load should, we think, be the price for timber of twenty-three feet and upwards, and fourteen inches square. Probably the most favourable time to negotiate the sale would be when he is surrounded by ships. To keep our market supplied we shall send out the *Woodbridge* (520 tons), to leave this in *November*, for a cargo of timber twenty feet length and upwards; you will therefore prepare for her. The contract up to this moment has not had the slightest effect on the price. We, however, suspect, that things cannot remain long in their present state. We remain, Gentlemen, your most obedient,

FORSTER and SMITH."

Upon this the Plaintiffs commenced the present action, to recover damages for the libel contained in the letter.

At the trial before *Tindal* C. J., *London* sittings after *Hilary* term, it was contended, that the letter in question was a privileged and confidential communication, and that, at all events, the mere transmission of the letter by the Defendant to his correspondents did not

1830.

WARD v. SMITH.

amount to a publication by the Defendant: that the publication was by *Clouston*, who had betrayed the confidence reposed in him. The Chief Justice was of opinion, that there had been a sufficient publication by the Defendant, and left it to the jury to decide whether the letter had been written fairly and honestly for the purposes of mercantile communication, or with a malicious intention to injure the Plaintiffs.

The jury found a verdict for the Defendant; whereupon

Wilde Serjt. obtained a rule *nisi* for a new trial, on the ground that, after the Defendant had himself agreed to deal with the Plaintiffs and even to take their bills, it was impossible to suppose the letter could have been written for honest purposes.

Taddy Serjt. shewed cause. The letter itself contains passages which justify the supposition that it was written in the necessary confidence of mercantile communication; and if there be evidence on both sides, the Court will not disturb a verdict, particularly where it is in favour of a Defendant. It would be destructive of mercantile confidence and communication, if a merchant be called on to assign all the reasons which have induced him to express a given opinion on the characters of persons with whom he or his correspondents may be concerned. The Defendant, as a creditor of *Weston* and *Clouston*, and for their protection, was directly interested in the communication he made. But in *M'Dougall* v. *Claridge* (*a*), where the defendant addressed some bankers, and charged the plaintiff with improper conduct in the management of their concerns, Lord *Ellenborough* said, "If a communication of this sort, which

(*a*) 1 *Campb.* 267.

was

1830.

WARD v. SMITH.

was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted." And in *Dunman* v. *Bigg* (*a*), "Even if the representations which he made were intemperate and unfounded, still, if he really believed them at the time to be true, he cannot be said to have acted maliciously." Whatever the Defendant here may have thought of the Plaintiffs at a former period, there is no evidence whatever to shew that he believed the representations made in his letter to be at that time unfounded; and the letter being on the face of it confidential and privileged, it was for the Plaintiffs to shew clearly that the communication was only a cover for falsehood.

The Court, however, thought that, under all the circumstances, the case ought to be submitted to another jury, upon payment of costs, and therefore made the rule

Absolute.

(*a*) 1 *Campb.* 268.

SHILLITO *v.* THEED.

June 23.

THE Plaintiff having been nonsuited in consequence of the accidental absence of a witness whom he had *subpœnaed*, the Court set aside the nonsuit, and granted a new trial, on payment of costs; although *Wilde* Serjt. objected, that, the nonsuit not having been occasioned by any misconduct on the part of the Defendant, he was entitled to retain his judgment.

1830.

Sir EDWARD STRACY, Baronet, and Another, *v.* The Governor and Company of the Bank of ENGLAND.

Certain stock of the Plaintiffs was transferred under a forged power of attorney: the Bank of England offered to replace the stock if the Plaintiffs would first prove the amount under a commission of bankruptcy, issued against a firm in which the forger of the power had been a partner: after this offer, the Plaintiffs received a dividend, and engaged to tender a proof of their demand under the commission of bankruptcy: Held, that they could not sue the Bank in respect of the stock, till they had fulfilled their engagement to tender the proof under the commission of bankruptcy.

THE declaration stated, that, whereas before and at the time of committing the grievance thereinafter mentioned, the said Sir *Edward Stracy* and *Josias Henry Stracy*, as survivors of one *Hardinge Stracy*, deceased, were lawfully possessed of a certain large sum, to wit, the sum of 605*l.* 11*s.* 2*d.*, interest or share in the joint stock of the annuity created by an act of parliament of the fourth year of the reign of his late Majesty King *George* III., intituled, "An Act for charging on the sinking fund certain annuities granted by an act passed in the first year of the reign of his said late Majesty, and for carrying the duties therein mentioned to the said fund, and also for consolidating such of the said annuities as are granted for a certain term of years, irredeemable, with other annuities granted by an act passed in the second year of his said Majesty's reign," and also by several subsequent acts of his said late Majesty's reign for raising further sums, and for consolidating the same with the said annuities, transferable at the Bank of *England*; which said stock, before the time of the committing of the grievance thereinafter mentioned, was standing in the public books of the said Governor and Company in the names of the said Sir *Edward*, (therein described as *Edward Stracy* of *Parliament Street*, Esq.) the said *Josias Henry*, and the said *Hardinge Stracy*, now deceased, and was in the

care

care of the said Governor and Company for the purpose, amongst other things, of making and entering in the said books such transfer of the said stock as the said Sir *Edward* and *Josias Henry*, as such survivors as aforesaid, should authorize and require; by means whereof the said Governor and Company became liable, and it became and was their duty to make and enter, and suffer and permit to be made and entered, in the books of the said Governor and Company a transfer or transfers of the said stock, or any part thereof, whenever the said Sir *Edward* and *Josias Henry*, as such survivors as aforesaid, should authorize and require them so to do: and that, also, at the time of the committing the grievance thereinafter mentioned, the said stock remained in the care of the said Governor and Company, and no transfer of the said stock, or any part thereof, had then been made in the books of the said Governor and Company by the authority or at the request of the said Sir *Edward* and *Josias Henry*, and the said *Hardinge Stracy*, deceased, or any or either of them: and that, also, afterwards, and before the committing of the grievance thereinafter mentioned, and whilst the said Sir *Edward* and *Josias Henry*, as such survivors as aforesaid, were so possessed of and entitled to the said stock, to wit, on the 20th day of *May* 1829, at *London*, the said Sir *Edward* and *Josias Henry* contracted and agreed with a certain person, to wit, one *Ealard Alder* for the sale and transfer to him of a certain part of the said stock so in the care of the said Governor and Company, to wit, for the sale of 302*l.* 15*s.* 7*d.*, part of the said stock, and the said *E. Alder* then and there agreed to purchase of the said Sir *Edward* and *Josias Henry* the said part of the said stock for the sum of 5885*l.* 5*s.* 4*d.*, to be paid to the said Sir *Edward* and *Josias Henry* at the time of the transfer of the said part of the said stock being made and entered in the

1830.

STRACY v. The Bank of ENGLAND.

books of the said Governor and Company: and that the said Sir *Edward* and *Josias Henry*, as such survivors as aforesaid, afterwards, to wit, on, &c., at, &c., authorized and required the said Governor and Company to make and enter the transfer of the said part of the said stock to the said *E. Alder* in the books of the said Governor and Company, and the said *E. Alder* was then and there ready and willing to accept and receive the said transfer, and to pay for the said part of the said stock according to the said contract, whereof the said Governor and Company then and there had notice: by means of which said several premises, the said Governor and Company then and there became and were liable, and it then and there became and was the duty of the said Governor and Company to make and enter the transfer of the said part of the said stock to the said *E. Alder* in their said books: yet the said Governor and Company, well knowing the premises, but not regarding their said duty, but contriving and intending to deceive and defraud the said Sir *Edward* and *Josias Henry* in that respect, did not nor would, when they were so authorized and requested as aforesaid, or at any other time, make and enter the said transfer of the said part of the said stock to the said *E. Alder* in their said books, but then and there wholly refused and still refused so to do: by means and in consequence whereof, the said Sir *Edward* and *Josias Henry* had been prevented from transferring to the said *E. Alder* the said part of the said stock in completion of their said contract so made with him as aforesaid, and had lost and been deprived of the said sum of 5885*l.* 5*s.* 4*d.*, which the said *E. Alder* had agreed to pay to the said Sir *Edward* and *Josias Henry* at the time of the transfer of the said part of the said stock being made and entered in the said books of the said Governor and Company: and the said Sir *Edward*

and

1830.
STRACY v. The Bank of ENGLAND.

and *Josias Henry*, in order to complete their said contract with the said *E. Alder*, had been forced and obliged to purchase and had actually purchased other stock, at a much higher price than the said sum at which they had so sold the said part of their said stock to the said *E. Alder*, to wit, at the price of 5923*l.* 2*s.* 3*d.*; and the said Sir *Edward* and *Josias Henry* had been and were, by means of the premises, put to great expense of their monies, to wit, to the expense of 100*l.*, and otherwise greatly injured and damnified, to wit, at, &c. to the damage of the said Sir *Edward* and *Josias Henry* of 6500*l.*

To this declaration the Defendants pleaded, first, not guilty; and, secondly, that the said several supposed causes of action in the said declaration mentioned did not, nor did any supposed cause of action therein mentioned accrue at any time within six years next before the commencement of that suit.

Upon these pleas the Plaintiffs joined issue; and, by a special verdict, the jury found

That, on the 25th of *October* 1808, there was standing in the books of the Governor and Company of the Bank of *England*, in the names of Sir *Edward Stracy*, then *Edward Stracy*, Esq. and *Josias Henry Stracy*, jointly with one *Hardinge Stracy*, now deceased, the sum of 605*l.* 11*s.* 2*d.* interest or share in the joint stock called the Long Annuities, transferable at the said Bank of *England*, which sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities belonged to Sir *E. Stracy* and *J. H. Stracy*, and *Hardinge Stracy*, now deceased, as trustees under the will of *Hardinge Stracy*, Esq. the elder, deceased, and had been transferred to them by the executors under that will: that the accounts of the proprietors of the said stock called Long Annuities are kept in certain books of the Governor and

1830.

STRACY v. The Bank of ENGLAND.

Company of the Bank of *England* called ledgers, and that accounts are entered in the form of debtor and creditor accounts in the said ledgers, of the whole amount of the said stock called Long Annuities; in which accounts the sums either subscribed or transferred to individuals are stated as items to their credit on one side of the account, and on the other side of the account they are debited with all sums transferred from their names: and that certain other books are kept by the Governor and Company of the Bank of *England*, in which are entered transfers of the said stock called Long Annuities from time to time, purporting to be signed by the parties transferring the same, or their attorney lawfully authorized: that, upon production of the transfer books, the clerks of the Governor and Company of the Bank of *England*, who keep the ledgers, enter the sums transferred, to the credit of the persons to whom the transfers are made, in the ledgers, by adding those sums to their accounts, if they already have any, or by opening new accounts with such persons if they have not already any accounts in such ledgers: that no entries in the ledgers are made without the authority of the entries which are made in the transfer books; but that, upon the production of such entries in the transfer books, the entries are made in the ledgers immediately, without further enquiry as to the genuineness thereof, and that any person, on whose account any sum or stock appears in such ledger, is permitted at any time, on application at the Bank of *England*, to transfer the same, or any part thereof, at his discretion:

That the Plaintiffs, at the time the said sum of 605*l.* 11*s.* 2*d.* Long Annuities stood in their names in the books of the Governor and Company of the Bank of *England*, well knew the course of business, and mode of transferring the said stock:

That

1830.

STRACY v. The Bank of ENGLAND.

That the accounts are balanced twice a year, for the purpose of making out dividends, and that the aggregate amount of the balances form the aggregate of the said stock called Long Annuities; and that such aggregate amount is transmitted half yearly to the audit office of the exchequer, for the purpose of ascertaining the amount which will be wanted for dividends, and that the dividends are calculated on the balance so ascertained: that an account is also once a year transmitted to the audit office of the exchequer, which contains the names of all the proprietors: that the dividends are paid twice a year to the holders of dividend warrants, which are made out from the ledgers in the names of the persons who appear by the ledgers to be entitled thereto:

That the said *Josias Henry Stracy* received the dividends due in respect of the said sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities, in person, from the month of *October* 1817 to the month of *April* 1820 inclusive, and paid them from time to time to the house of *Marsh* and Co., bankers in *Berners Street*, to the account of Mrs. *Stracy*, who had a life-interest in the said Long Annuities under the trusts created by the will of the said *Hardinge Stracy* the elder:

That, on the 23d of *June* 1820, the said *H. Stracy* the younger being then deceased, an entry was made in one of the transfer books of the Governor and Company of the Bank of *England*, purporting to be a transfer under a power of attorney, purporting to be granted to one *Henry Fauntleroy* by the said Sir *Edward Stracy*, then *Edward Stracy*, Esq., and *Josias Henry Stracy*, of an interest or share in the said stock called Long Annuities:

That the power of attorney under which the said entry was made was not executed by the said Sir *Edward Stracy* and *Josias Henry Stracy*, or either of them,

1830.

STRACY v. The Bank of ENGLAND.

them, but that the signatures to the said power of attorney, purporting to be the signatures of the said Sir *E. Stracy* and *J. H. Stracy* were forged: that the said *H. Fauntleroy* had not any authority from them or either of them to make any such transfer; and that the said Sir *E. Stracy* and *J. H. Stracy* did not, nor did either of them, ever authorize or request the Governor and Company of the Bank of *England* to make any transfer of the said sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities, or any part thereof, until the request and refusal hereinafter mentioned:

That an entry was thereupon made in one of the ledgers of the Governor and Company of the Bank of *England*, by which the said *E. Stracy* and *J. H. Stracy* were debited with the said sum of 605*l.* 11*s.* 2*d.* Long Annuities, and credit was given to *Gilbert Burrington* for the sum of 605*l.* 11*s.* 2*d.* in the said stock, and from that time the said Sir *E. Stracy* and *J. H. Stracy* ceased to have credit for any sum in the said stock called Long Annuities in the said ledgers: that from that time their account with the Governor and Company of the Bank of *England* was closed in the said ledgers, and that no dividends on the said stock were applied for or received by the said *E. Stracy* and *J. H. Stracy*, or either of them, in respect thereof after the month of *April*, in the year of our Lord 1820: nor has any dividend warrant on that identical sum of stock separate from other stock since been made out or paid:

That since the 23d of *June* 1820 very numerous transfers of Long Annuities, of sums both great and small, have been made to and by the said *Gilbert Burrington* which have been debited and credited to him, and that the said sum of 605*l.* 11*s.* 2*d.* Long Annuities has thereby become blended and mixed with other stocks standing in the said ledgers in the said *Gilbert Burrington*'s name, and has been transferred and assigned

signed by him, and that it is not possible to distinguish the account to the credit of which the said Long Annuities stand which were so carried to the credit of the said *Gilbert Burrington*, and debited to the within named Sir *E. Stracy* and *J. H. Stracy* as aforesaid:

That the said Sir *E. Stracy* and *J. H. Stracy* did not consent to and had not any knowledge of the above entry having been made in the month of *June* 1820, in the transfer book of the Governor and Company of the Bank of *England*:

That the said *J. H. Stracy* was a partner in the said banking-house in *Berners Street*, which carried on business under the firm of *Marsh* and Co., and the business of which house the said *H. Fauntleroy* chiefly managed:

That *Marsh* and Co. kept an account with *Martin*, *Stone*, and Co. bankers in the city of *London*, in the usual way of a banker's account, and that a pass-book went from one house to the other from time to time according to the usual practice between bankers:

That *Marsh* and Co. kept a book called a house-book, in which corresponding entries to those in the pass-book ought to have been made, and that in the due course of business the pass-book and the house-book of *Marsh* and Co. ought to have corresponded:

That the house-book was in constant use in the banking-house of *Marsh* and Co., and that the pass-book was frequently brought thither from the house of *Martin* and Co.; and when it was at the banking-house of *Marsh* and Co. the said *H. Fauntleroy* kept the same generally locked up in his own desk:

That the said *H. Fauntleroy* was permitted by the other partners to conduct the greater part of the business of the said banking-house without their interference: that they were not men of business: that they had no knowledge of book-keeping: that they reposed great confidence in the said *H. Fauntleroy*, and that the said

H. Faunt-

1830.

STRACY v. The Bank of ENGLAND.

H. Fauntleroy made very many false entries and omissions in the house-book, so that the same did not correspond with the pass-book in many instances: that the said *H. Fauntleroy* paid into the hands of *Martin* and Co., and drew out of their hands, considerable sums, which appear respectively in the pass-book, but not in the house-book; and also made very many other false entries in the other books of the firm without the knowledge and in fraud of his partners, to a large amount:

That on the 23d day of *June* 1820, the said *H. Fauntleroy* ordered one *Thomas Butterfield Simpson*, a stock-broker, to sell out the sum of 605*l.* 11*s.* 2*d.* Long Annuities, described as standing in the books of the Governor and Company of the Bank of *England*, in the names of *E. Stracy*, of *Parliament Street*, Esq., and *J. H. Stracy*, of *Berners Street*, Esq., survivors in a joint account with *H. Stracy*, late of *Lincoln's Inn*, deceased; and that the said *T. B. Simpson* sold the same to *Gilbert Burrington* for the sum of 10,786*l.* 10*s.* 1*d.*, which sum he received from the said *G. Burrington*: that according to the course of business between the said *T. B. Simpson* and the said *Marsh*, *Stracy*, and Co., the said *T. B. Simpson* allowed the said *Marsh*, *Stracy*, and Co. one half of the usual commission when employed by them to effect sales, and upon the said sale he allowed one half of the commission; and that the said *T. B. Simpson* paid the sum of 10,778*l.* 13*s.* 10*d.*, being the amount of the sum so received by him from the said *Gilbert Burrington*, deducting one half of the usual commission, by a check payable to the said *H. Fauntleroy*, into the hands of Messrs. *Martin* and Co. to the account of *Marsh* and Co.:

That no entry was made at any time of the said sum of 10,778*l.* 13*s.* 10*d.* in the house-book, or any other books of *Marsh* and Co., but only in the pass-book of that firm with *Martin* and Co.

That

1830.

STRACY v. The Bank of ENGLAND.

That on the 16th of *September* 1824, in consequence of the discovery of the forgeries of the said *H. Fauntleroy*, *Marsh* and Co. became bankrupts:

That from the month of *April* 1820, up to the date of the said bankruptcy, entries were made in the books of *Marsh* and Co. by which Mrs. *Stracy*'s account was credited with the amounts of the dividends on the said sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities as it had previously been, and as if those dividends had been regularly received from time to time; that such entries were all made in the hand-writing of the said *H. Fauntleroy*, and that at the date of the said bankruptcy there was a balance of between 600*l.* and 700*l.* in the books of *Marsh* and Co. in favour of Mrs. *Stracy*:

That after the bankruptcy the said Sir *E. Stracy* made application to the Governor and Company of the Bank of *England* respecting the said sum of 605*l.* 11*s.* 2*d.* interest or share in the said stock called Long Annuities; and that thereupon the following letter was written by the attornies of the Governor and Company of the Bank of *England* to the Plaintiffs, and sent to the said Sir *E. Stracy*:—

"4th *Dec.* 1824.

"Gentlemen,—The Governors and Directors of the Bank of *England* have had under their consideration your claim to have 605*l.* 11*s.* 2*d.* per annum Long Annuities, which formerly stood in your names, replaced. They find, upon enquiry, that the stock in question was sold and transferred in your names by one of the partners in the late firm of *Marsh*, *Stracy*, and Co., and that the produce of the stock was paid into the hands of Messrs. *Marsh*, *Stracy*, and Co. You have, therefore, as the Bank is advised, a right to prove the amount received on your account, and to receive a dividend upon that proof under Messrs. *Marsh*, *Stracy*, and Co.'s commission:

1830.

STRACY v. The Bank of ENGLAND.

mission: and we are directed by the Governors and Directors to request, that such proof may be tendered and enforced by petition, if it should not be admitted by the commissioners; after which the Bank will be ready to replace the amount of your stock so sold, upon having an assignment of your proof; and the dividends on the stock so replaced, which accrued subsequent to the latest period at which they were credited to you by Messrs. *Marsh, Stracy*, and Co., will also be paid to you:

"We beg to add, that we are ready to afford you information and assistance as to the evidence by which your right to prove will be established.

We are, &c."

That on the 31st of *May* 1825, the Governor and Company of the Bank of *England* paid the said Sir *E. Stracy* the sum of 605*l.* 11*s.* 2*d.* on his signing and entering into the following receipt and agreement:—

"31st *May* 1825. Received of the Governor and Company of the Bank of *England* the sum of 605*l.* 11*s.* 2*d.*, being the amount of payments which would have been made to me for the two half years on the 10th *October* and 5th *April* last on 605*l.* 11*s.* 2*d.* Long Annuities, if that stock had not been transferred, as I allege it to have been, without any legal authority from me:

"I say, received the same, without prejudice to my right to prove for the produce of the said stock under *Marsh* and Co.'s commission, or my right to claim to have the said stock replaced by the said Governor and Company. And I hereby engage, if the said debts should be decided by a court of law to be provable, when required by the said Governor and Company, to tender a proof to the commissioner under the bankruptcy of *Marsh* and Co. in respect of the produce of such stock sold out by them; and in case such proof shall

shall be rejected, to enforce the same by petition at the expense of the said Governor and Company.

E. STRACY, and for J. H. STRACY,
Survivors of HARDINGE STRACY."

That on or about the 16th *May* 1829, the said Sir *E. Stracy* and *J. H. Stracy* applied to the Governor and Company of the Bank of *England* to transfer a part of the said sum of 605*l.* 11*s.* 2*d.* Long Annuities; and that thereupon the attornies for the Governor and Company of the Bank of *England* wrote and sent to the said Sir *E. Stracy* and *J. H. Stracy* a letter, whereof the following is a copy:—

"Gentlemen,—Having been informed by the officers of the Bank that an application was made on your behalf to transfer 300*l.* odd, Long Annuities, from the names of Sir *E. Stracy* and *J. H. Stracy*, survivors of *Hardinge Stracy*, we beg to suggest, that before any application is made relative to the stock transferred in the year 1820, under an authority alleged to have been forged, you should tender to the commissioners the proof engaged to be made by you on the estate of *Marsh* and Co., in respect of the proceeds of that stock. We are satisfied, that it is equally important to all parties in this case to reduce as much as possible the litigation necessary to an adjudication on the conflicting claims. We confidently expect that these must be disposed of before the vacation, if the measures now in progress are allowed to go on; but if proceedings are adopted against the Bank, the delay and expense will be increased in a degree which it is serious to contemplate. We feel that the delay that has taken place must have been most irksome to the parties; and it has been, no doubt, purposely created by the agents of the assignees with a view to exhaust the patience of the claimants. We should regret that they succeeded in this when the transaction

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1830.

STRACY v. The Bank of ENGLAND.

is so near a close, particularly as no means have been spared by the Bank to render the delay as little inconvenient as possible to the parties. If proceedings are adopted against the Bank, they will necessarily avail themselves of every defence within their power, though they will reluctantly enter into such a contest.

We have the honour to be, &c."

That on the 20th *May* 1829, and after the death of the said Mrs. *Stracy*, the said Sir *E. Stracy* and *J. H. Stracy* sold to one *E. Alder* the sum of 302*l.* 15*s.* 7*d.* of the said stock called Long Annuities, for the sum of 5885*l.* 5*s.* 4*d.*, which they received from the said *E. Alder*: that on the same day the said Sir *E. Stracy* and *J. H. Stracy*, together with the said *E. Alder*, went to the Bank of *England* and required the Governor and Company of the Bank of *England* to transfer into the name of the said *E. Alder* the sum of 302*l.* 15*s.* 7*d.* of the said stock called Long Annuities, as and for part of the said sum of 605*l.* 11*s.* 2*d.* Long Annuities; and the said *E. Alder* at the same time offered to accept the same; but that the Governor and Company of the Bank of *England* refused to make such transfer, and stated that there was not the sum of 302*l.* 15*s.* 7*d.* Long Annuities in the names of *E. Stracy* and *J. H. Stracy*, survivors of *Hardinge Stracy*:

That the said Sir *E. Stracy* and *J. H. Stracy* afterwards bought and caused to be transferred to the said *E. Alder*, a sum of 302*l.* 15*s.* 7*d.* in the said stock called Long Annuities, in pursuance of the said sale so made to him, for which sum the said Sir *E. Stracy* and *J. H. Stracy* paid the sum of 5923*l.* 2*s.* 3*d.*; and that the said Sir *E. Stracy* and *J. H. Stracy* thereby sustained a loss of 37*l.* 16*s.* 11*d.*, being the difference between the said sums of 5923*l.* 2*s.* 3*d.* and 5885*l.* 5*s.* 4*d.*, together with the amount of the commission

mission paid by them to their broker on the said transaction, amounting to 7*l.* 7*s.*

That there was negligence on the part of the said *Josias Henry*, arising from want of knowledge of business:

But as to the issue first within joined between the parties, whether or not, upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, the Governor and Company of the Bank of *England* are guilty of the premises above laid to their charge or not, the jurors aforesaid are wholly ignorant. And thereupon, &c.

This case was argued at great length in *Easter* term last, by *Spankie* Serjt. for the Plaintiff, and *Taddy* Serjt. for the Defendants, chiefly on two points: first, whether the Bank is liable to make good to the original holder, stock which has been transferred under a forged power of attorney; and, secondly, whether the Plaintiffs' omission to fulfil their engagement to prove their demand under *Marsh* and *Stracy*'s commission of bankruptcy did not suspend their right to proceed against the Bank. The decision of the Court is confined to the latter question; but it has been thought right to present an outline of the argument on both points.

Argument for the Plaintiffs. Government stock is a right to receive an annuity: it is not a chattel interest of which the holder may be dispossessed, but an incorporeal hereditament of which he cannot be disseised: *Wildman* v. *Wildman* (*a*), *Bracton*, c. 12. *Justin. Inst.* b. 2. tit. 2. *Vinnius in loc.* 2 *Bl. Com.* 40. 3 *Bl. Com.* 179. *Co. Lit.* 144. *b. Lit.* s. 588.: and it is only by express provision in all the statutes touching the national debt,

(*a*) 9 *Ves.* 174.

1830.

STRACY v. The Bank of ENGLAND.

that government stock passes to the personal representative of the owner. The Bank of *England* may be likened to the lord of a manor, and wrongful seizure by the lord, or admittance of one who has no claim to be admitted, confers no title. *Watk. Copyh. Zouch* v. *Forse.* (*a*) The acts of parliament which create the stock provide for the mode of transfer, which can only be effected by the party entitled to the stock, or his attorney duly authorized. In *Hildyard* v. *The South Sea Company and Keate* (*b*), the company were ordered to restore to the right owner stock which had been transferred under a forged power. There was a similar decision in *Harrison* v. *Price* (*c*), and *Ashby* v. *Blackwell.* (*d*) In *Monk* v. *Graham* (*e*), the action was brought against the purchaser of the stock: but the right of the original owner has never been doubted; and the decision in *Davis* v. *Bank of England* (*g*) was reversed on a mere technical point not argued in the Court below: the reasoning of the Chief Justice as to the inexpediency of supposing a transfer to have taken place, remains in its full force. The Bank of *England* is only the agent of the government to pay dividends; the government is the debtor; and the Bank cannot, without authority, release the debtor from the claim of the real creditor.

Then, assuming the Plaintiffs' rights to have been unaffected by the transfer under the forged power, the Plaintiffs' engagement to tender a proof of their claim under *Marsh* and *Stracy*'s commission does not bar their action against the Bank. At the utmost it affords no more than a ground of cross action for the Bank. But the Plaintiffs' rights remaining always the same, there is no consideration for their engagement with the Bank: it is *nudum pactum*, and the mere conditional offer of

(*a*) 7 *East*, 186.
(*b*) 2 *P. Wms.* 76.
(*c*) *Barnardist.* 24.
(*d*) 2 *Eden*, 299.
(*e*) 8 *Mod.* 9.
(*g*) 2 *Bingh.* 393.

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the Bank does not amount to accord and satisfaction. To bar the action, the Bank should shew that they have given the Plaintiff an equivalent for what he demands. Accord without satisfaction is not sufficient. *Com. Dig. Accord.* (B). *Reniger* v. *Fogossa* (*a*), *Peyto's* case (*b*), *Onelie's* case (*c*), *Allen* v. *Harris* (*d*), *James* v. *David.* (*e*) And this cannot be said to be a settlement of conflicting rights and doubtful claims, as in *Longridge* v. *Dorville* (*g*), for the Plaintiffs' claim is exempt from doubt. The money paid into the house of which the Plaintiffs were partners was *Burrington's* money, and not the money of the Plaintiffs. The Plaintiffs, however, were ignorant of the whole transaction. The breach of trust was committed by *Fauntleroy* alone, and does not implicate the innocent partners in the firm. *Ex parte Apsey* (*h*), *Ex parte Hunter* (*i*), *Ex parte Heaton* (*k*), *Emly* v. *Lye.* (*l*)

Argument for the Defendants. The earlier authorities have very little weight in a question touching the nature and incidents of stock,—a species of property altogether of modern origin. *Bracton* could scarcely have foreseen the creation of a 3 per cent. fund, and even *Justinian* and *Vinnius* must have been in the dark on the subject of *consols.* But according to the principle laid down by Sir *William Grant*, in *Wildman* v. *Wildman*, a party can be no more possessed of stock than he can be dispossessed; he has merely a right to receive dividends; so that the argument derived from the doctrine of disseisin goes too far. The passage in *Co. Lit.* 144. *b.* does not lay down that an annuity is

(*a*) *Plowd.* 1.
(*b*) 9 *Rep.* 77. 79.
(*c*) *Dyer*, 356. *a.*
(*d*) 2 *Lutw.* 1537. 1 *Lord Raym.* 122.
(*e*) 5 *T. R.* 141.
(*g*) 5 *B. & A.* 117.
(*h*) 3 *Br. Ch. C.* 265.
(*i*) 1 *Atk.* 223.
(*k*) *Buck.* 386.
(*l*) 15 *East*, 7.

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1830.

STRACY v. The Bank of ENGLAND.

necessarily real property, but merely that the remedy for it is by writ of annuity, which is in form a real action. And as to incorporeal hereditaments, *Blackstone* expressly says (vol. iii. p. 170.), disseisin of them cannot be by dispossession, but by disturbance in the means of coming at or enjoying them. Unless the Plaintiffs were possessed of the stock, they cannot sue the Defendants for refusing to transfer it. The question, therefore, is, whether they can be predicated to have been possessed of it, as they aver in the declaration. Of what were they possessed? of the 605*l.* 11*s.* 2*d.*, or of the mere right to receive an annuity in respect of an entry in the Bank books?—Of the right merely. Upon the transfer, that sum is placed to the credit of *Burrington*; it is subsequently divided, subdivided, passes into various hands, and occasions a multitude of transactions which it would be impossible to unravel. The Bank may buy stock of others, and place it to the Plaintiffs' account; but they could not do that which the Plaintiffs complain they have refused to do, namely, permit a transfer of what has already been transferred. By all the statutes which create stock it is declared to be personal property; but if it were real, against whom should the writ issue?—Not against the Bank, for the government is in effect the debtor. The analogy of the lord of the manor, therefore, suggested in *Hildyard* v. *The South Sea Company*, is altogether inapposite; and in *Ashby* v. *Blackwell*, Lord *Northington* dissented both from the decision and the reasoning of that case. In *Davis* v. *The Bank of England*, it was said, the Bank could not refuse to pay the subsequent dividends to the transferee under the forged power; if so, how can the former holder be said to remain in possession? and the declaration here proceeds on the assumption that the Plaintiffs are in possession; for the Bank is not called on to make compensation for negligence, but to do that which

which they can only do on the supposition that the stock still belongs to the Plaintiffs. So that at all events the count is ill conceived. Thus, when a carrier loses goods, the owner cannot declare in trover on his possession, but must sue in case for negligence. *Ross* v. *Johnson.* (*a*)

But, secondly, the agreement between the Plaintiffs and the Bank amounts to a settlement of matters in dispute between the parties, which imposes on the Plaintiffs the necessity of fulfilling the conditions of the agreement before they can revert to their original claim. And the conditions might have been fulfilled, for the debt is provable under the commission. *Stone* v. *Marsh.* (*b*) It is not a case of accord and satisfaction, where the party accepting the satisfaction loses all cause of action, but an agreement to suspend a disputed cause of action on good consideration; the consideration being, payment, without demur, of a demand at least questionable, upon the claimants performing a condition precedent. *Longridge* v. *Dorville* is an authority to shew that such an agreement may be insisted on, where an action is brought in breach of its conditions; and *Tatlock* v. *Smith* (*c*) shows that the present action is at least premature, the conditions of an agreement for the settlement of claims not having been fulfilled. Then, the produce of the stock having been paid into the firm of which the Plaintiffs were members, they have incurred no damage.

In reply it was contended, that possession is according to the nature of the property said to be possessed; and here the possession was the possession of the right to receive the debt, or to command its transfer. The word *possessed* was employed in the declaration according to

(*a*) 5 *Burr.* 2825. (*b*) 6 *B.* & *C.* 551. (*c*) 6 *Bingh.* 339.

1830.

STRACY v. The Bank of ENGLAND.

its popular sense; and the Plaintiffs had been sufficiently possessed of the right, to call on the Defendants to put them in their original situation, or to pay an equivalent in damages The Plaintiffs had nothing to do with unravelling the subsequent accounts: to oppose that difficulty to their claim would be as hard as to call on an owner of lemons to recompose them when in a state of solution among the combined ingredients of a bowl of punch. The owner of the stock, and the purchaser under the forged power, were, it is true, both innocent; but the buyer was the younger brother, the owner the elder; and as between those two, the elder must be preferred. But the case did not differ from that of a private banker, who was bound to make good to his customer all money paid under a forged authority.

Cur. adv. vult.

TINDAL C. J. The declaration in this action is framed in accordance with the judgment of this Court, given in the case of *Davis* v. *The Bank of England*; in which case it was held that the owner of property in the funds still remained the legal holder of the stock, notwithstanding it had been transferred to another name under a forged power of attorney. Accordingly this declaration states, that the stock had been in the names of the Plaintiffs in the books of the Governor and Company of the Bank of *England*, and that no transfer of the stock had been made; and alleges as a breach of the duty on the part of the Bank, their refusal to make and enter in their book a transfer of the Plaintiffs to a purchaser of part of the stock. One question, and that which has been principally argued at the bar, turns upon the rule of law laid down by this Court in the case above referred to, and involves, in fact, a rehearing of that case. It becomes unnecessary, however, for this Court, upon the present occasion, to give any opinion upon

upon the law so declared by the Court; indeed, as the question is raised upon the record, it is more satisfactory that a decision in which two of my learned Brothers now sitting with me concurred, should be made the subject of review in another Court, where, in case it becomes necessary, that question may be discussed upon a writ of error.

But it has become unnecessary on the present occasion to review that judgment, because (with the exception of my Brother *Bosanquet*, who was engaged in the cause, and who has taken no part in this discussion,) we all think our judgment ought to be given for the Defendants, upon another point which has been presented for the consideration of the Court. For it appears to us that the Plaintiffs have, before the commencement of this action, entered into an agreement with the Defendants upon good consideration; under which agreement their right of action is suspended, until they take the proceeding which they had bound themselves by such agreement to adopt.

It appears upon the special verdict, that, long before the commencement of the action, the Plaintiffs had applied to the Defendants respecting the stock in question; and that, upon the 4th *December* 1824, the solicitor of the Bank wrote a letter to the Plaintiffs, stating, in substance, that if they would prove the amount of their demand against the estate of Messrs. *Marsh*, *Stracy*, and Co., and make an assignment of their proof, the Bank would replace the amount of the stock so sold. It was at that time a question of great nicety and difficulty, whether the Bank was by law liable to make good this loss: so that the engagement of the Bank to replace this stock without any litigation on their part, was of itself a very valuable and important concession; and a sufficient consideration to support a promise by the Plaintiffs, that they would

1830.

STRACY v. The Bank of ENGLAND.

tender, and endeavour to enforce, their proof against the bankrupt's estate. But it appears further, that both parties proceeded to act upon the faith of this agreement; and that, on the 31st of *May* following, the Bank paid to the Plaintiffs one year's annuity of this stock, viz. 605*l.* 11*s.* 2*d.*, taking a receipt from the Plaintiffs; in which receipt the Plaintiffs expressly engage, if the debts shall be decided by a court of law to be provable, to tender a proof to the commissioners when required by the Governor and Company of the Bank of *England.*

The substance of this contract appears to us to be, that the Bank, on the one hand, agreed to replace the stock, and to pay the intermediate dividends; and the Plaintiffs, on the other hand, agree, in the first instance, and before they claim the stock adversely, to tender a proof of their debts. And this agreement having been acted upon by the Plaintiffs, so far as to receive one of the annual payments due upon this stock; and the Plaintiffs, although requested thereto, having refused to tender the proof; we think it would be against good faith to allow this action to be maintainable, until the Plaintiffs have performed their part of the stipulation.

It is urged by the Plaintiffs, that if this is an agreement on their part, it may be the ground of an action by the Bank to recover damages, but that it is no bar to the present action. But the agreement is not set up as a perpetual bar; it is merely insisted on as an objection to the action being brought at the present time. It is urged as an agreement by which the Plaintiffs have for a good consideration restrained themselves from suing, not perpetually, but only until they have first done a particular act. And it is not immaterial to observe, that the very circumstance of bringing this action, if the Plaintiffs succeed in it, will have the effect of making it impracticable for them to keep their agreement

1830.

STRACY v. The Bank of ENGLAND.

ment so entered into with the Defendants: for the Plaintiffs cannot recover in this action, except by establishing the principle that they are still holders of the stock which has been sold; and if they continue such holders, they cannot make proof of any debt under the commission.

Under these circumstances, we think the Defendants, in order to avoid circuity of action, may avail themselves of this agreement as a suspension of the Plaintiffs' right to sue in the present action, and that they are not confined to a remedy by a cross action thereon. The case of *Longridge* v. *Dorville* appears to us strongly in favour of the validity of such an agreement.

As this point appears to us to be in favour of the Defendants, it becomes unnecessary to consider the third question raised by the special verdict; and we therefore, upon the second ground which was urged in argument, give judgment in this case for the Defendants.

Judgment for the Defendants.

1830.

June 30.

FOX *v.* CLIFTON, WICKEY, LEVI, GREEN, HARTLEY, PLUMMER, and FENNELL.

A prospectus was issued for a distillery company with a capital of 600,000*l.* and 12,000 shares, and to be conducted pursuant to the terms of a deed to be drawn up. All persons who did not execute the deed within 30 days after it was ready, were to forfeit all interest in the concern. No more than 7500 shares were ever allotted: only 2300 persons paid the first deposit; only 1106, the second, and only 65 signed the deed; and the directors, after the time for paying the second instalment had elapsed, advertised that persons who had omitted to pay had forfeited their interest in the concern. Held, that an application for shares, and payment of the first deposit, did not constitute a partner, one, who had not otherwise interfered in the concern, and that the insertion of his name by the secretary of the company in a book containing a list of subscribers was not a holding out as partner.

ASSUMPSIT for work and labour, and materials found.

The cause was tried before *Tindal* C. J., *London* sittings after last *Trinity* term, when the facts appeared to be as follows: —

Early in *March* 1825, certain persons met together, and resolved that a company should be immediately formed, to be called "The Imperial Distillery Company." After a preliminary announcement of their intention by advertisement, on the 19th *March* a meeting was held at the *London Tavern*, at which directors, a clerk, and engineer were appointed; and on the 23d of *March* a further advertisement appeared in the newspapers as follows: —

"Imperial Distillery Company, capital 600,000*l.*, 12,000 shares, at 50*l.* each:" — (after a list of names of trustees, directors, auditors, bankers, counsel, solicitors, engineers, and secretary; and an explanation of the merits of the scheme; the advertisement proceeded as follows: — ("The affairs of the company are under the management of a board of directors; the capital is 600,000*l.*, in 12,000 shares of 50*l.* each. A deed of settlement will be prepared forthwith, which must be executed within thirty days after the same shall be ready for that purpose; and every person who shall

neglect

1830.

FOX v. CLIFTON.

neglect to execute the same within that time will forfeit all share and interest in the company. The deed is to contain all such clauses and conditions as the standing counsel and solicitors to the company shall deem necessary for carrying on the business of the company, and for enforcing the observance and performance of the several rules and regulations to be contained therein, or in any bye-law that shall be from time to time made by the directors. Application is intended to be made to parliament for an act to enable the company to sue and be sued in the name of one of its officers: and the said deed of settlement, when settled and approved by the standing counsel and solicitors, and the act of parliament, when passed, shall be the deed of settlement and act of parliament for managing the affairs of this company.

"The shares will be forthwith allotted; and until offices are taken, all communications are requested to be made to the directors, at the *City of London Tavern*.

(Signed) W. LANE, Sec."

A meeting was held on the 23d of *March*, at which 7000 shares were appropriated, and letters printed in blank were distributed by the secretary among the intended shareholders, to be addressed by them to Messrs. *Fisher* and *Norcutt* solicitors for the concern, as an application for shares, to the following effect: —

"Sir, — I request you will insert my name for shares of the Imperial Distillery Company, and I hereby engage to make the payment thereon when requested."

To which letters, the secretary replied in the following form: —

"Sir, — I am instructed by the directors of this company to inform you, that they have apportioned to you shares of 50*l.* each in the same, and I request

1830.

FOX v. CLIFTON.

request you will pay the deposit of *5l.* per share into the hands of Messrs. *Bosanquet, Pitt*, and Co., *Lombard Street*, on or before the 28th inst.

W. LANE, Sec."

A list of the persons whom the secretary had so addressed was sent to the bankers, *Bosanquet* and Co.

On the 28th of *March*, the Defendants, or some person on their behalf, appeared at the bankers' with letters as above, paid the sums required, and took a scrip receipt in the following form: —

"*London*, 28th *March* 1825.

"No. 6720 to 6735.

"Received of the directors of the Imperial Distillery Company the sum of fifty pounds.

"For Messrs. *Bosanquet, Pitt, Anderson*, and Co.

"£50. P. STAINSBY."

The directors then took a counting-house in *Mark Lane*, and by the end of *May* took and fitted up a distillery in *Buckinghamshire*. This was announced to the subscribers by a letter of the 4th of *July*, which, after stating the purchase and its objects, proceeded, —

"For the purpose of enabling the directors to carry these very desirable objects into effect, they are under the necessity of making a call of *5l.* upon each share. You will, therefore, have the goodness to pay the sum of 50*l.* (being *5l.* each on the shares allotted you) any day before the 19th inst., at the office of the company, No. 9. *Mark Lane*, when the scrip can be exchanged for shares.

"It is particularly requested that you will not delay the payment beyond the day above named; the directors being under engagements essential to the interest of this company, which preclude the possibility of further time being allowed. W. LANE, Sec."

It

1830.

FOX v. CLIFTON.

It did not appear whether the Defendant *Clifton* had ever received this letter.

A book was made up by the secretary, of the names of all who had made payments upon their shares, including the Defendants, and kept in the counting-house in *Mark Lane*.

A book was also made up, and kept at the same place, of the names of all who had applied for shares, without regard to the fact of their having paid deposits, or otherwise.

The names were arranged alphabetically, one leaf being assigned to each letter of the alphabet. The names were upwards of 200.

The directors then advertised for tenders in the business undertaken, and the Plaintiff applied to the secretary at the counting-house to know of what persons the company consisted. The secretary assured him they were respectable; and, upon the Plaintiff's begging he would be explicit, adding, that he should be ruined if misled, the secretary opened the book containing the names of the subscribers, and the Plaintiff looked over some of them, but whether he saw the names of the Defendants or not did not appear.

On the 18th of *July*, however, he entered into the contract which was the subject of the present action, and the work was done between the 2d of *August* 1825, and the 15th of *July* 1826.

The contract was a tender sent by the plaintiff, addressed to the chairman and directors of the Company, in answer to their advertisement.

The partnership deed mentioned in the advertisement bore date the 30th of *June*, and from that time lay open on the table of the office. It was executed by about sixty-five persons, in the early part of *July*; but by none of the Defendants except *Plummer*.

Only

1830.

Fox v. Clifton.

Only 7490 shares were ever allotted: only 2293 persons paid the first deposit; 1106 the second; and no more than fifty or sixty the third. The Defendants, *Clifton*, *Wickey*, *Levi*, and *Fennell*, did not pay the second or the third; and as early as the middle of *May*, *Wickey* and *Levi* had sold their scrip.

Whoever brought the scrip receipt, and proposed to pay the second call and to sign the deed, was permitted to do so, whether the shares had been originally allotted to him, or whether he had purchased them in the market.

On the 16th of *July* the following notice was published in *The London Gazette*, of the deed of settlement being ready for execution: —

"Imperial Distillery Company,
No. 9. *Mark Lane*.

"Notice is hereby given, that the directors having resolved on making a call of 5*l*. a share, to be paid on or before the 18th instant, and also on issuing shares in lieu of scrip receipts, the scrip-holders are therefore requested, either by themselves or their authorized agents, to attend at the office of the company, No. 9. *Mark Lane*, for the purpose of paying to a committee of directors the amount of the shares held: also for the purpose of exchanging scrip for the shares, and of signing the deed of settlement, which has been approved of by the standing counsel and the directors. Should it be inconvenient for any scrip-holder to attend for the purpose of signing the deed, printed forms of powers of attorney may be procured at the office, empowering persons to execute the deed for them; it being determined by the directors that no scrip-holder can receive shares for scrip until he has first signed the deed of settlement; and no scrip can be exchanged for shares after *Monday* the 18th instant.

W. Lane, Sec."

On

1830.

FOX v. CLIFTON.

On the 25th of *July* the following letter was addressed by the secretary to the subscribers: —

"Imperial Distillery Company, 9. *Mark Lane*, *July* 25. 1825.

"Sir, — I am directed to remind you that the deed of settlement of this company, which has been approved by the standing counsel, and signed by the directors and many of the subscribers, now awaits your signature; and that unless the same be signed and the second instalment of 5*l.* per share paid immediately, the shares unpaid for will be forfeited; the directors having made engagements highly advantageous to the company, which will preclude further time being allowed.

W. LANE, Sec."

On the 12th of *August* the directors advertised that the deposits would become forfeited on all scrip for which the deed of settlement was not signed, and the first call paid on or before the 23d. And on the 27th of *August* another advertisement appeared, declaring that such deposits on the now outstanding scrip were forfeited for the use and benefit of the proprietors, and authorising applications to be made for the shares so forfeited.

On the second call being paid, the scrip receipt was given up and a fresh paper issued, denominated a share. That share-paper was in the following form: —

"Imperial Distillery Company. Capital, 600,000*l.* Shares, 12,000; 50*l.* each. No. 635. This is to certify, that *John Smith*, of *London*, hath paid the sum of 5*l.* upon the above-mentioned share in this company, and that he is entitled to the same share, subject to the future instalments to be made thereon, and to the laws and regulations of the company as contained in the deed of settlement establishing the same; and also subject

1830.
Fox
v.
Clifton.

ject to such bye-laws laws and regulations as may be made by the directors of the company.

John Dunston,
Rob. Hone,
W. Aston,
} Directors."

(Indorsed)

" Second instalment.

" Received the 18th of *July* 1825, the sum of 5*l.*, the amount of the second call on the annexed shares.

W. Lane, Sec."

A third call was made by the directors in the latter end of the year 1825.

On the 6th of *December* 1825, the Defendants *Green* and *Hartley*, who had paid the second call, received the following letter:—

" Imperial Distillery Company.

" Sir,—I am instructed by the directors of this company to remind you that you have not paid the third instalment on the shares held by you herein, and to request that you will forthwith pay the same, as no extension of time can be allowed, an early payment being necessary to carry into effect the objects and operations of the company.

W. Lane, Sec."

On the 23d of *December* the following letter was also received by the Defendant *Green* from the secretary:—

" Imperial Distillery Company, 9. *Mark Lane.*

" Sir,—The directors, on inspecting the list of subscribers to this company, have found with much surprise your name amongst those who have omitted to pay the third instalment. I request, therefore, you will immediately pay the same, in order that the necessary arrangements may be completed, and that I may report thereon at the next meeting.

W. Lane, Sec."

These

1830.

FOX v. CLIFTON.

These letters having passed unheeded, the secretary wrote a third letter on the 14th *January* 1826 to the Defendants *Green* and *Hartley*.

"Imperial Distillery Company, 9. *Mark Lane*.

"Sir, — I am now for the last time instructed by the directors to inform you, that unless the third call of *5l.* per share on the shares held by you be paid on or before the 21st instant, at the office of the company, you will be considered no longer a shareholder under the deed of settlement, but as having abandoned all interest in the concern; and the shareholders who may have paid will then be deemed the only parties interested in the funds and concerns of the company, and they will forthwith adopt such measures as they think fit, and will no longer hold you answerable for any further instalment, or entitled to receive back any sums whatsoever.

"I repeat that this is the last notice which will be sent, and that the line of conduct in case of your non-payment will be rigidly adhered to.

W. LANE, Sec."

Upon these facts, *Tindal* C. J. left it to the jury to say, 1st, Whether, when the contract was entered into with the Plaintiff, all the Defendants were, as partners, entitled to a share of the profits of the concern.

2dly, Whether, if this were an inchoate partnership, the Defendants had legally withdrawn themselves from the concern before the partnership was complete.

3dly, Whether, in such case, they had held themselves out as partners.

A verdict having been found for the Plaintiff,

Taddy Serjt., in *Michaelmas* term, on behalf of the Defendants *Clifton* and *Wickey*, obtained a rule *nisi* to set it aside, on the ground that the first point had been left too widely to the jury, being rather a question of

1830.
Fox
v.
Clifton.

law than of fact; and that, on the second and third, the verdict was against the evidence.

Wilde and *Bompas* Serjts. shewed cause against the rule, and *Taddy* Serjt. supported it; but similar rules having been obtained and supported on behalf of the other Defendants by *Adams* and *Jones*, Serjts., and *Bosanquet* J. having subsequently joined the Bench, the Court desired that the cause might be argued again on the single question of partnership. Accordingly,

In *Easter* term, that point was again argued by *Bompas* for the Plaintiff, and *Taddy* for all the Defendants.

Argument for the Plaintiff.

The question in cases like the present has often been unnecessarily embarrassed by the uncertain meaning attached to the word *partner* or *shareholder*: but whatever designation it may be proper to apply to the Defendants, as connected with the Imperial Distillery Company, at all events they were *jointly interested* in it; and if jointly interested, they are jointly liable to the Plaintiff. As early as *March* the company was advertised as an existing company, with directors appointed and announced. Before the Plaintiff was employed, the Defendants had applied for shares, had contributed to the funds of the concern, and those contributions had been employed collectively with others in the purchase of premises for carrying on the business. If at this period, before any thing further had been done, it had been resolved to abandon the concern, and the premises had been resold at a profit, the Defendants would have been jointly interested in and entitled to a share of those profits, whether a partnership had been formally constituted by deed or not. It follows, therefore, that they are jointly liable to the demands on the concern.

1830.

FOX v. CLIFTON.

concern. This company was not protected by charter or act of parliament, and, therefore, though it consist of never so great a number of members, it is subject to the same law as a partnership of two or three. In *Natusch* v. *Irving* (*a*), Lord *Eldon* says, "It is not, I apprehend, competent to any number of persons, in a partnership (unless they shew a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation, by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and, in effect, merely by *compelling* them to retire upon such terms, so to form a *new company*. This would, as to partnerships, be a most dangerous doctrine." In *Rex* v. *Dodd* (*b*) Lord *Ellenborough* says, "Independent of the general tendency of schemes of the nature of the project now before us to occasion prejudice to the public, there is, besides, in this prospectus, a prominent feature of mischief; for it therein appears to be held out that no person is to be accountable beyond the amount of the share for which he shall subscribe, the conditions of which are to be included in a deed of trust to be enrolled. But this is a mischievous delusion, calculated to ensnare the unwary public. As to the subscribers themselves, indeed, they may stipulate with each other for this contracted responsibility; but as to the rest of the world, it is clear that each partner is liable to the whole amount of the debts contracted by the partnership." And this principle is recognized in *Carlen* v. *Drury* (*c*), *Baldwin* v. *Lawrence* (*d*), and numerous other cases.

Parties have been holden entitled to a share in the profits of a concern, where their connection with it has been much less obvious and notorious than that of the

(*a*) *Gow on Partnersh.* 404.
(*b*) 9 *East*, 527.
(*c*) 1 *Ves. & B.* 154.
(*d*) 2 *Sim. & Stu.* 18.

1830.
Fox
v.
Clifton.

Defendants in the present case: as the executors of a deceased partner; *Brown* v. *De Tastet* (*a*); or minors; *Anon.* (*b*) So that if one of the Defendants had pleaded in abatement the non-joinder of the rest, the Plaintiff could not with safety have replied that they were not partners. In *Ex parte Layton* (*c*) it was held, that the words "*and* Co." were sufficient to announce a dormant partnership, and to entitle the defendant to plead it in abatement. And very slight acts have been deemed such a holding out to the world as to render a party responsible: as the mere delivery of a bill of parcels; *Young* v. *Axtell* (*d*); the payment of an instalment towards a joint undertaking; *Holmes* v. *Higgins* (*e*); the associating together and subscribing sums of money for the purpose of obtaining a bill in parliament to make a railway; *Kearsley* v. *Codd* (*g*), *Maudslay* v. *Le Blanc* (*h*); the contributing to the funds of a building society; *Braithwaite* v. *Skofield* (*i*); the paying a deposit on shares in a trading company, and afterwards signing the deed of partnership; *Lawler* v. *Kershaw* (*k*). *Perring* v. *Hone* (*l*), confirmed by *Ellis* v. *Schmæck* (*m*), and *Nockells* v. *Crosby* (*n*), are decisions in point to establish the liability of parties who have entered on an undertaking such as the present.

In *Bird* v. *Aston* (not reported), the payment of a deposit and instalment was held by Lord *Tenterden* sufficient to constitute a partnership, except as to one who purchased in the character of a broker.

In the present case, the exhibition of the book containing the Defendants' names, and their payment of the

(*a*) 1 *Jacob.* 284.
(*b*) 2 *Ves.* sen. 629.
(*c*) 6 *Ves.* 438.
(*d*) Cited in *Waugh* v. *Carver*, 2 *H. Bl.* 242.
(*e*) 1 *B.* & *C.* 74.
(*g*) 2 *Carr.* & *P.* 408.
(*b*) 2 *Carr.* & *P.* 409.
(*i*) 9 *B.* & *C.* 401.
(*k*) 1 *M.* & *M.* 93.
(*l*) 4 *Bingh.* 28.
(*m*) 5 *Bingh.* 521.
(*n*) 3 *B.* & *C.* 814.

deposit

deposit at the bankers, were acts of holding themselves out as partners, more unequivocal than any of the acts relied on in the cases cited.

If the Defendants were once partners, they could not divest themselves of their responsibility except by a regular dissolution of partnership. *Duvergier* v. *Fellows* (*a*), *Goode* v. *Harrison*. (*b*)

Argument for the Defendants.

This was an inchoate, not a complete arrangement; the whole was in *fieri* till the partnership deed was fully signed; and the directors who gave the orders to the Plaintiff were responsible to him, not the other Defendants, who took no active part in getting up the concern. It is true, there is no difference between a partnership of five and a partnership of 5000. But where the subject-matter of that which is predicated is uncertain; where the members are uncertain; where the fund, and the number of shareholders required by a prospectus, have not been obtained; though there may be an intent to constitute a company when the concern is launched, yet till that intent is carried into effect by the execution of the deed which is to be the bond of union, the subscribers to the undertaking cannot be called partners. These Defendants contracted with the directors with reference to a company or undertaking to be established on a certain scale, to which no material approaches were ever made. The first call was paid by no more than 2293 persons instead of 12,000; the second by 1106 only; and the third by no more than fifty or sixty. Without proof, therefore, that the Defendants attended and were active in the concern, they are neither jointly interested nor jointly liable. *Brown* v. *De Tastet*, and the other cases in equity, turn on the

(*a*) 5 *Bingh.* 248. (*b*) 5 *B.* & *A.* 147.

1830.

FOX v. CLIFTON.

principle, that no one shall use the property of another without rendering an account; but they determine nothing as to the parties in whom the property of an inchoate concern shall be deemed to be vested, or as to the exterior liabilities of persons who propose to engage in it. So the decision in *Natusch* v. *Irving* proceeds on the assumption, that the undertaking was fully established, and the parties all known — *constabat de materiâ, constabat de personâ.* But in *Vice* v. *Lady Anson* (*a*), although the defendant had received certificates, and had acknowledged herself to be a shareholder, she was holden not responsible as a partner, because she had not been constituted such by any regular instrument. In *Lawler* v. *Kershaw* all the defendants except *Barber*, who had signed the deed, were directors, and as such, personally responsible for the orders they had given: and the same remark applies to *Kearsley* v. *Codd* and *Maudslay* v. *Le Blanc.* In *Perring* v. *Hone*, the point now in discussion, namely, whether subscribers are liable in respect of an inchoate undertaking, was never presented to the Court. The concern with which the defendant was alleged to be connected had been long established, and the only question was, whether he had divested himself of his interest by assigning the scrip, and omitting to sign the partnership deed; and the propositions ascribed to the Chief Justice, that "all who subscribed to the partnership fund must be taken to have assented to the deed, — an assent which the plaintiffs countenanced by afterwards attempting to dispose of their interest," — can scarcely be deemed law. In *Ellis* v. *Schmæck* the defendants had all attended meetings, and had been active in the concern. In *Braithwaite* v. *Skofield* they were all parties to the resolution, which was, in substance, the order for the work in respect of which they were sued. In *Bird* v. *Aston* there was a

(*a*) 7 *B.* & *C.* 403.

deed

deed executed by all. And in *Dickinson* v. *Valpy* (*a*), tried before *Burrough* J. at the *Bridgewater* Summer assizes 1829, *Parke* J. said, upon motion for a new trial in the Court of King's Bench, "In this case, it is very difficult to say that there was sufficient evidence to go to the jury that the defendant actually was a partner; because all the acts proved and relied upon at the trial were equally consistent with the supposition of an intention on his part to become a partner in a trade or business to be afterwards carried on, provided certain things were done, as with that of an existing partnership. There is a great difference between the two cases. If there is a contract to carry on any business by way of present partnership, between a certain definite number of persons, and the terms of that contract are unconditional or complete, I have already said that the partners give to each other an implied authority to bind the rest to a certain extent. But if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those conditions are performed. If any of the other intended partners in the mean time enter into contracts, it seems to me to be clear that he is not bound by them, on the simple ground that he has never authorised them (always supposing that he has not held himself out, directly or indirectly, to the party with whom the contracts are made, as having, in substance, given that authority). In those cases in which a Plaintiff has not been induced by the Defendant's representation *to give credit to him*, but seeks to fix him because he has *really authorised* the contract to be made, the Plaintiff must shew that authority, and an authority upon condition not performed, is no authority at all."

(*a*) 10 *B.* & *C.* 140.

1830.

Fox v. Clifton.

In *Harvey* v. *Kay* (*a*) a deed had been executed, and the defendants came within its terms; but in *Bourne* v. *Freeth* (*b*) the defendant was holden not a partner, because the partnership was contemplated only, not executed. Lord *Tenterden* said, "The question, whether he did hold himself out to the world as a partner, depends entirely on the effect of the prospectus which he signed. That instrument indicates that a company was about to be formed, not that one was actually formed. It shews only that it was in the contemplation of the parties who had subscribed their names to it, to establish a company on certain conditions."

In the present case every thing remained to be accomplished, and it would be impossible to say with whom the Defendants were associated; whether with those who had signed the deed, or those who had not signed: or with those who had paid the first instalment, and not the second; or the second, and not the third. The payments made by, and the letters addressed to, the Defendants, gave them no actual interest; but merely a possible interest in case the undertaking should be brought to bear. The directors are the persons solely responsible for the expenses of such a concern; *Nockells* v. *Crosby*; if, indeed, the plaintiff can have any claim at all upon engaging with an association, at that time, illegal. *Josephs* v. *Pebrer*. (*c*)

In reply it was urged, that a deed was not essential to the establishment of a partnership: that many partnerships are conducted without: that it is immaterial to the public whether the partners observe the terms of their agreement among themselves; and that an individual who gives credit can enquire no farther than for the names announced at the place where the business of the company is conducted. *Vice* v. *Lady Anson* was a case touching an interest in a mine, and turned on the point that nothing had been done to give the defendant

(*a*) 9 *B.* & *C.* 356. (*b*) 9 *B.* & *C.* 639. (*c*) 3 *B.* & *C.* 639.

an

an interest in real property. In *Dickinson* v. *Valpy*, *Parke* J. stood alone in the positions cited. In *Harvey* v. *Kay*, Lord *Tenterden* relied on the defendant's letters as being conclusive against him: and in *Bourne* v. *Freeth* the undertaking was never actually commenced, like the present, by the purchase of premises and the employment of tradesmen.

Cur. adv. vult.

TINDAL C. J. This action was brought by the Plaintiff against the seven Defendants, to recover the amount of a demand for goods sold and delivered by the Plaintiff to the Defendants, and for work and labour done and materials found by the Plaintiff for them, and at their request.

It appeared at the trial of this cause at *Guildhall*, that the contract, upon which the action was founded, was not made personally and individually with the Defendants, but with the chairman and directors of a certain joint stock company called the "Imperial Distillery Company;" the contract being a tender sent in by the Plaintiff on the 18th of *July* 1825, addressed to such chairman and directors, in answer to an advertisement which had been published by the directors on the 24th of *June*, stating their readiness to receive tenders for the supply and erection of the works in question. But it was contended at the trial, that upon the evidence in this case, the seven Defendants must be considered partners in this company, or, if not partners, that, at all events, they had allowed themselves to be so held out to the Plaintiff, and were therefore bound by the contract of the directors, and liable to the payment of the Plaintiffs' demand.

Three questions were left to the jury at the trial:—first, whether, at the time of making this contract, the defendants were partners in this joint concern; in which case the jury were told the verdict must be for the Plaintiff:

1830.
Fox
v.
Clifton.

Plaintiff: secondly, admitting they were not partners in fact, whether they had by their conduct held themselves out to the Plaintiff as partners, or allowed themselves to be so represented at the time of making this contract; in which case, also, the jury were directed to find for the Plaintiff: and, thirdly, whether, admitting the Defendants to have been at one time dormant partners in this concern, any one of them had ceased to be a partner before the contract in question was made; in which case the jury were told they were to find for the Defendants.

The jury found a general verdict for the Plaintiff for the amount of his demand; and the case comes now before the Court, upon a rule obtained by the Defendants to set aside that verdict, and for a new trial; as well upon the ground that the direction on the first point was not a proper direction, as also that the verdict was against the evidence given in the cause.

The main and important question in this case undoubtedly is, whether, under the circumstances proved at the trial, the Defendants were actually partners in the Imperial Distillery Company; for, if partners, the general principle which governs all partnerships in trade would apply to the present case — that each individual partner constitutes the others his agents for the purpose of entering into all contracts for him within the scope of the partnership concern; and, consequently, that he is liable to the performance of all such contracts, in the same manner as if entered into personally by himself.

But before we give our judgment upon this, the principal question, it may be convenient to clear the case of the second point which has been made, viz. whether the Defendants have held themselves out to the world generally, or to the present Plaintiff in particular, as partners in the present concern; for, if such should be the result of the evidence, it would render any inquiry into the first question altogether immaterial.

Now,

1830.

FOX v. CLIFTON.

Now, the evidence upon which the Plaintiff contends that the Defendants permitted themselves to be represented to the Plaintiff as partners in the concern is, that the secretary to the company had prepared a book containing a list of the names of all those persons to whom shares had been allotted in the concern, in which list the names of the seven Defendants had been included; that this list had been left with the bankers of the company to enable them to receive the deposits from the contributors, upon which list the payments had been made and receipts given at the banking-house; and that a copy of it was lying upon the table of the counting-house belonging to the company, where it was seen by the Plaintiff when he called upon the subject of the contract; and that, on one occasion, when the Plaintiff was expressing a doubt about trusting such a numerous company, the secretary opened the book, and the Plaintiff looked over some of the names.

The book itself, when referred to, contained lists, on the different pages, of the names of the several persons to whom shares had been allotted, arranged alphabetically, one leaf being assigned to each letter of the alphabet, and the whole number of names consisted of upwards of 200; so that the merely opening the book in the counting-house and seeing some of the names could not, in the ordinary course of things, give any intimation to the Plaintiff that the names of the seven Defendants were included in the lists. Indeed, it is not argued on the ground that the Plaintiff saw the names of the Defendants in this list, but that the bare circumstance that their names were included in such list used for the purposes above specified, by their own permission, was a sufficient holding themselves out to the world as partners in the company.

But, in the first place, there was no evidence that the Defendants knew of the existence of any copy of the list at the counting-house; still less, any evidence that

1830.

FOX v. CLIFTON.

that such list was made up, or shewn to any one, with their permission or knowledge. The holding ones-self out to the world as a partner, as contra-distinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership; and is altogether incompatible with the want of knowledge that his name has been so used. Thus, in the ordinary instances of its occurrence, where a person allows his name to remain in a firm, either exposed to the public over a shop-door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liability as a partner.

That there must have been some list of the subscribers to so numerous a company, the Defendants may, indeed, be taken to have known; it would have been impossible to make calls for deposits, to give notices, or to do any of the acts necessary for carrying on the concern, without a written list of the names of subscribers. So far, therefore, the authority of the Defendants to the existence of a list may be assumed. But that implies no authority whatever that a copy should be made out to lie in the counting-house, for the purpose of being shewn to strangers who might demand to look at it. And still less could the list left with the bankers be considered as making any communication to the world with the assent of the Defendants. That list was a matter in strict confidence and privity between the banker who received the money, and the party who called with the letter in his hand and paid the deposit. It held out no information to the public, because not communicated to any third person whatsoever. Even upon the face of the book itself, it conveyed no information of the relation in which the parties

1830.
FOX
v.
CLIFTON.

ties stood to each other; as it contained nothing but a long list of names, without any notice or heading whatever; leaving it altogether uncertain whether the persons named are partners in any concern actually established, or merely subscribers to a projected partnership: and as to the receipt given by the bankers for the deposit, and called the scrip receipt, it could give no information to any one; for it was a receipt given to the directors *eo nomine*, and not to the individual paying the money.

But, without reference to the information which the Plaintiff actually received from the book, we think the communication of this book was no act done by the Defendants themselves, or by their authority or permission, so as to make them nominal and ostensible partners, in contradistinction to real partners or sharers in the profits of the concern; so that the verdict, if it rested on this part of the evidence, cannot be supported.

The question, therefore, must be considered, whether, upon the facts of this case, the Defendants were partners in the Imperial Distillery Company with the directors and other shareholders, at the time this contract was made: for, by the general rule of law relating to partnerships in trade, each would then be liable to the debts of the whole company contracted in the course of the trade. This is a consequence not confined to the law of this country, but extending generally throughout Europe; and it is founded, partly on the desire to favour commerce, that merchants in partnership may obtain more credit in the world; and, more especially, on the principle that the members of trading partnerships are constituted agents the one for the other, for entering into contracts connected with the business and concerns of the partnership; so that by the contracts of the agent all his principals are bound. (See *Pothier, Traité du Contrât de Société*, ch. 6. s. 1.) The question, therefore, becomes this, — whether, at the time of this contract

1830.
Fox
v.
Clifton.

tract made by the directors, the relation between the Defendants and them was such, that the directors were constituted the agents of the Defendants to bind them by their contracts?

The first act done on the part of the Defendants is an application by letter from each of them, except one, requesting the name of the party to be inserted for a certain number of shares in the Imperial Distillery Company, and engaging to make payment thereon. All these letters appear to have been written between the 2d and 21st of *March*; and so completely was the company unformed at the time, that the letters were addressed to Messrs. *Fishers* and *Norcutt*, who acted as solicitors for the persons, whoever they might be (for it does not distinctly appear), who were endeavouring to establish the concern. On the 19th of *March* a public meeting was held, which was attended by many persons, whether by the Defendants or not, there is no evidence, at which meeting, according to the language of the secretary, "the company was formed."

On the 23d of *March* an advertisement appears, headed, "Imperial Distillery Company; — capital 600,000*l.*, in 12,000 shares of 50*l.* each;" giving the names of the trustees and other officers, and adverting to other particulars which it will be necessary to refer to afterwards.

It was not until the 24th, the day following the advertisement, that an answer was sent to the different applicants, signed by the secretary, who had been appointed in the mean time, informing them that the directors had appropriated a certain number of shares to each, and requesting them to pay the deposit of five pounds per share before the 28th of *March*.

Now, the advertisement described the proposed undertaking as "The Imperial Distillery Company." It is said this description assumes that it is a company already formed: but the very circumstance of publishing an advertisement proves that it was only a project for

1830.
FOX
v.
CLIFTON.

for a company, not a company actually formed; for if the 600,000*l.* had been subscribed, and the 12,000 shares allotted, why publish an advertisement? It could only be intended for the purpose of inducing others to subscribe. The description employed in the advertisement of the advantages to be gained by the subscribers, proves also the object of the publication; and the conclusion points more directly to the *future* formation of a company: it states, that "A deed of settlement will be prepared forthwith, which must be executed within thirty days after the same shall be ready for that purpose; and every person who shall neglect to execute the same within that time shall forfeit all share and interest in the company. The deed is to contain all such clauses and conditions as the standing counsel and solicitors to the company shall deem necessary. The shares will be forthwith allotted; and, until offices are taken, all communications are requested to be made to the directors, at the City of London Tavern."

Now, this advertisement is the basis of the contract between the parties; it is upon the footing of this prospectus, that the seven Defendants had their shares allotted to them, and paid their deposits: if they are not partners under this agreement, they are not partners under any; for they neither exchanged their scrip-receipts for certificates of shares; nor executed the deed when prepared; nor paid a second call when made; nor appeared at any meeting; nor interfered with any concerns of the company; nor did any act subsequent to the making this contract; nor any act before, other than applying for shares and paying the deposit of 5*l.* per share, when they learnt from the letter of the secretary that a certain number of shares was appropriated to them.

The paying of the deposits must undoubtedly be taken to imply an assent to the terms of the advertisement;

1830.

FOX v. CLIFTON.

ment; that is, an assent to become partners in a company raising a capital of 600,000*l.*, consisting of 12,000 shares, and to be governed by a deed which should contain the clauses and conditions to be agreed on in future: but we think it implies nothing more; and that it cannot be construed as an assent to the terms of a partnership already formed.

When, therefore, instead of an allotment of 12,000 shares, the utmost that were ever allotted scarcely exceeded 7500; when, out of that number, no more than 2300 ever paid the first instalment; when not half the latter number paid the second instalment, and only sixty-five subscribers signed the deed; we think the subscribers were at liberty to say, This was not the trading company upon which we paid our deposit; neither the capital, nor the number of shares, bearing any reasonable proportion to the original plan and project. And this the more especially, because, by the terms of the advertisement, they were taught to expect that the utmost risk which they encountered was the loss of all share and interest "in the concern" upon their refusal to execute the deed; which loss they appear to have submitted to.

There are no facts subsequent to the payment of the deposit which in any manner affect the seven Defendants. On the 30th of *June* the deed was prepared for signature, and shortly afterwards signed by the directors, and those of the shareholders who paid the second instalment, not exceeding sixty-five in number: and it is not immaterial to observe, that so little was the partnership considered as fixed before the execution of the deed, that, according to the evidence of the secretary, any person producing a scrip receipt, and paying a second call, whether an original subscriber or not, was permitted to execute the deed. The Defendants, however, on this record, with the exception of *Plummer*, never

never executed the deed; nor did any more than two of them ever pay the second instalment.

On the 16th of *July* there was an advertisement in the *Gazette*, making a second call for *5l.*, and informing the subscribers "that it had been determined by the directors, that no scrip-holder could receive shares for scrip until he had first signed the deed of settlement, and no scrip could be exchanged for shares after *Monday* the 18th instant."

The Defendants, except as above, neither exchanged their scrip, nor executed the deed. On the 12th of *August* the directors advertised that the deposits would become forfeited on all scrip for which the deed of settlement was not signed, and the first call paid on or before the 23d. And on the 27th of *August* a second advertisement appeared, declaring, "that such deposits on the now outstanding scrip were forfeited for the use and benefit of the proprietors; and authorizing applications to be made for the shares so forfeited."

At this moment, therefore, the consequence had followed which the original prospectus had declared, viz. "the forfeiture of the deposits, and all interest and share in the concern;" and no subsequent offer by the directors, to allow the subscribers to be restored to their shares upon the execution of the deed, could alter their relation to each other, unless assented to by themselves.

Upon this first question, therefore, whether a partnership was actually formed, we think, if the right to participate in the profits of a joint concern is to be taken, as undoubtedly it ought to be, as a test of a partnership, these Defendants were not entitled at any time to demand a share of profits, if profits had been made; inasmuch as they had never fulfilled the conditions upon which they subscribed. We think the matter proceeded no further, than that the Defendants had offered to become partners in a projected concern, and that the concern

1830.

Fox v. Clifton.

proved abortive before the period at which the partnership was to commence: and, therefore, with respect to the agency of the directors, which is the legal consequence of a partnership completely formed, we think the directors proceeded to act before they had authority from these Defendants; for they began to act in the name of the whole, before little more than half the capital was subscribed for, or half the shares were allotted. The persons, therefore, who contracted with the directors, must rest upon the security of the directors, who made such contract, and of those subscribers, who, by executing the deed, have declared themselves partners, and of any who have by their subsequent conduct recognized and adopted the acts and contracts of the directors; but they have not the security of the present Defendants, who are not proved by the evidence to stand in any one of such predicaments.

It is unnecessary to advert to any of the cases which have been referred to, each of which must rest upon its own peculiar circumstances; except that with respect to *Perring* v. *Hone*, decided in this court, we think it right to observe, that the great point, whether there was a partnership or not, does not appear to have been made the prominent subject of argument, but to have been rather assumed than disputed; for the advertisement or prospectus was not brought to the attention of the Court, nor is there any argument upon the terms of it. It is not incompatible with that determination, that the Court might have held the proof of partnership incomplete, if the same materials had been brought before them which are presented to us.

Upon the view which we have taken of the two first questions in this case, it becomes unnecessary to give any opinion on the third, as to the divesting of the liability of any of the Defendants by the sale of their scrip before this contract was entered into.

On

1830.

Fox v. CLIFTON.

On the whole, therefore, we make the rule absolute for setting aside the verdict for the Plaintiff, upon the broad ground, that we do not think, under the circumstances proved, the directors had any authority to bind these Defendants by the contract upon which the action is founded.

Rule absolute.

WOMERSLEY *v.* BOUSFIELD.

June 22.

A prisoner in custody for debts exceeding 300*l.* is liable to be brought up under the compulsory clause of the Lords' Act.

ANDREWS Serjt. moved that the Defendant, who had been in custody in execution for debts not amounting to 300*l.*, might be brought up under the compulsory clause of the Lords' Act, the Plaintiff having given him the twenty days' notice of his intention to require a true account of all his real and personal estate, and all incumbrances affecting the same. Since the motion, he had been charged in execution at the suit of another creditor for 500*l.*; upon which

Bompas Serjt. contended, that he ought not to be subjected to the compulsory power in the act of 33 *G.* 3. *c.* 5.; inasmuch as the effect would be to take from him all his property, and still leave him at the mercy of the second execution.

There being a suspicion that the detainer was collusive, the Court remanded the prisoner for a week; when, upon his declining to give in a proper schedule, he was remanded for sixty days, subject to the consequences of his contumacy, the Court being of opinion that, notwithstanding the second execution, he was within the operation of the statute.

See *Chappell* v. *Ashley*, 5 *B.* & *A.* 537.

1830.

REGULA GENERALIS.

IT IS ORDERED, That from henceforth, in all special arguments in this Court, notice, in writing, of the points which are intended to be insisted upon by each of the parties be delivered to the Judges at their chambers two days before the day on which the case shall be set down for hearing, either by marking the points in the margin of the books delivered to the Judges, or on separate paper: and that each of the parties do, within the same time, leave a copy of such notice at the chambers of the Lord Chief Justice, to be delivered to the adverse party upon his application.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
J. B. BOSANQUET.

MEMORANDUM.

His Majesty King *George* the Fourth died on *Saturday*, the 26th *June*, upon which occasion, only one Judge sat in each Court for the purpose of taking bail.

AN

INDEX

TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

ACCORD AND SATISFACTION.

Certain stock of the Plaintiffs' was transferred under a forged power of attorney: The Bank of *England* offered to replace the stock, if the Plaintiffs would first prove the amount under a commission of bankruptcy issued against a firm in which the forger of the power had been a partner: after this offer the Plaintiffs received a dividend, and engaged to tender a proof of their demand under the commission of bankruptcy:

Held, that they could not sue the Bank in respect of the stock, till they had fulfilled their engagement to tender the proof under the commission of bankruptcy. *Stracy* v. *The Governor and Company of the Bank of England.* *Page* 754

ACTION ON THE CASE.

See EVIDENCE, 2. CARRIER, 1.

1. The Plaintiff, who had a right to irrigate his meadow by placing a dam of loose stones across a small stream, and occasionally a board or fender, fastened the board by means of two stakes, which had never been done by his predecessors:

The Defendant, who had rights on the same stream, removed the stakes and the board also:

A verdict having been given for the Plaintiff in an action for such removal, the Court refused to set it aside; holding, that the Defendant had no right to remove the board as well as the stakes, on the ground that the stakes gave the board a character of permanency incompatible with her own rights. *Greenslade* v. *Halliday.* *Page* 379

2. Where a party recommends an agent, by making statements which he knows to be false, he is responsible in damages for the misconduct of the agent, although it be not shewn that the recommendation was given from malice, or with a view to the pecuniary interest of the party recommending. *Foster and Another* v. *Robert Charles.* *Page* 396

3. Plaintiff left in a hackney-coach in *London*, and lost, her reticule, containing a 100*l.* bank post bill, indorsed in blank; she issued hand-bills proclaiming her loss. Defendant, a banker at *Brighton*, who had never heard of the loss, cashed the bill for a stranger eight days afterwards. The stranger, on being asked his name, said he was on a journey, and wrote on the bill a fictitious address in an illiterate hand. The Defendant did not enquire at what inn he was staying: Held, that the Defendant was liable for the amount to the Plaintiff. *Strange* v. *Wigney.* 677

ADULTERY.

See DOWER, 1.

AFFIDAVIT.

See PRACTICE, 4.

AFFIDAVIT TO HOLD TO BAIL.

See PRACTICE, 7.

AMENDMENT.

See PLEADING, 1. PRACTICE, 6.

ANNUITY.

Breaches need not be assigned under 8 & 9 *W.* 3. *c.* 11. on non-payment of an annuity secured by a warrant to confess judgment on a *mutuatus.* *Shaw* v. *The Marquis of Worcester.* *Page* 385

ARBITRATION.

Plaintiff who had taken a verdict subject to an award under an order of *nisi prius*, after the case had been heard, and just before the award was about to be made, revoked the arbitrator's authority, with circumstances savouring of *mala fides*, and gave fresh notice of trial. The order of *nisi prius* not having been made a rule of court, the Court refused to stay proceedings. *Green* v. *Pole.* 443

ASSUMPSIT.

See ACCORD AND SATISFACTION.

1. Defendants engaged Plaintiff to superintend mines in *America* for three years, at a salary of 600*l.* *per annum*, to increase 50*l.* every year, and commence from his leaving *England*, with a proviso, that Plaintiff should not be dismissed without a twelvemonth's notice or a twelvemonth's salary, and the reasonable expenses of his return, and that, if he stayed at the mines three years, a sum should be allowed for the expence of the return of his family. Plaintiff

Plaintiff left *England* in *August* 1825, and arrived at the mines in *April* 1826.

Defendants dismissed Plaintiff in *September* 1827, without giving notice or paying a year's salary, or any expenses of return. In an action for breach of the contract, a verdict having been given with damages to cover a year's salary from the time of dismissal, with leave for the Plaintiff to move to increase the damages by 320*l.*, the expense of the return of the Plaintiff's family, and 470*l.*, the amount of salary from the end of a year after dismissal to the end of the third year after his arrival at the mines,

Held, that the Plaintiff was not entitled to increase the damages by the amount of those sums. *French* v. *Brookes and Another.* *Page* 354

2. The Defendant kept a heifer which he had bought of a drover on *Sunday*, and afterwards made a promise to pay for: Held, that having kept the beast he was liable, at all events, on the *quantum meruit*, notwithstanding the contract made on *Sunday*. *Williams* v. *Paul.* 654

ATTESTATION.

See WILL.

ATTORNEY.

1. A suggestion that Defendant defends by *A. B.*, "who has been appointed solicitor on behalf of his Majesty, and acts as such in this behalf," is a sufficient disclosure to the Court that *A. B.* has authority to act under 9 *G.* 4. *c.* 25., and Plaintiff cannot treat the plea as a nullity, although, otherwise than by such suggestion, the record does not shew that the cause concerns matters of revenue. *West* v. *Taunton.* *Page* 404

2. An attorney with the advice of counsel, in an action against *J. B.* for negligence in the conduct of Plaintiff's defence to another action, produced the prothonotary's book to prove an allegation, "that, in consequence of the negligence of *J. B.*, judgment by default had been signed, and such further proceedings had that final judgment was afterwards signed and execution issued;" whereupon, Plaintiff was nonsuited for not producing the record of that judgment, or a proper copy: Held, that this was not such negligence as rendered the attorney liable to an action. *Godefroy* v. *Dalton*, Gent. 460

3. Where the parties settle a cause without the intervention of the Plaintiff's attorney, he cannot proceed to trial for his costs, unless he can clearly establish collusion between the parties to deprive him of his costs. *Nelson* v. *Wilson.* 568

AVOWRY.

See PLEADING 2.

AWARD.

1. Where a Plaintiff makes several claims against a Defendant, and the Defendant makes others against the plaintiff, if an arbitrator to whom the cause is referred, finds that the Plaintiff had no cause of action, his award is, in that respect at least, sufficiently certain. *Hayllar* v. *Ellis*. *Page* 225
2. By a judge's order, an award was to be made by the first day of *Trinity* term, or such further day as the arbitrator should appoint by indorsement on the order. The arbitrator enlarged the time by indorsement, and before the expiration of the enlarged time, one of the parties, at his request, procured a judge's order for a further enlargement, which was acted upon by all parties, and the arbitrator made his award beyond the time of the first enlargement, but within the time so further enlarged, but made no further indorsement on the original order: Held, that he had authority for making his award. *Leggett* v. *Finlay*. 255

BAIL.

See BANKRUPT, 4. 7.

1. A member of a corporation may be bail in error in an action brought against the corporation. *Henly* v. *Mayor and Burgesses of Lyme Regis*. 195
2. Where defendant, subsequently to arrest, and before perfecting special bail, was committed to criminal custody, in which he remained, awaiting the decision of the twelve judges on a point of law arising out of his defence on the criminal charge, the Court refused to enlarge, till the opinion of the judges should have been delivered, the time for perfecting special bail, or to permit the sheriff's bail to render him. *Joyce* v. *Pratt*. *Page* 377
3. Allowance of bail discharged on affidavit of perjury by bail, uncontradicted.

   Detainer against principals in custody refused. *Barling* v. *Waters*. 423
4. The bail consented to the Defendant's giving a *cognovit* on such terms as he could obtain from the Plaintiff. A *cognovit* was then given in *February* to pay in *May*; default having been made in *May*, the Defendant negotiated, but in vain, till *June* 13th.

   The bail having been proceeded against without any notice of this negotiation, the proceedings were set aside. *Charleton and another* v. *Morris and Another*. 427
5. Where a Defendant was allowed time to answer Plaintiff's affidavit impeaching the sufficiency of Defendant's bail, he was not allowed to put in fresh bail instead of answering the affidavit, although his time for putting in bail had not expired, nor had any attachment been issued against the sheriff. *Cockburn* v. *Ling*. 782

BANKERS.

See ACTION ON THE CASE, 3.

BANKRUPT.

1. A payment of a partnership debt, made by a partner who has committed an act of bankruptcy, to a creditor who has notice thereof, is not protected by *s.* 82. of 6 *G.* 4. *c.* 16. *Craven and Others, Assignees of W. and B. Alred, Bankrupts*, v. *Edmondson.* *Page* 734

2. Where a lessee becomes bankrupt, a surety joined in the lease with him is liable to the lessor for breaches of covenant occurring between the date of the commission and the delivery up of the lease by the lessee under 6 *G.* 4. *c.* 16. *s.* 75. *Tuck and Others, Executors of Gibbons* v. *Fyson.* 321

3. 1. A bill of exchange is a chattel within the meaning of 6 *G.* 4. *c.* 16. *s.* 3.; the fraudulent delivery or transfer of which will constitute an act of bankruptcy.

2. Closing the doors and shutters of a bank is a "beginning to keep house," although the banker be not domiciled at the bank. *Cumming and Others, Assignees of Cavanagh and Others, Bankrupts*, v. *Baily.* 363

4. Where an uncertificated bankrupt, in order to try the validity of his commission, held his assignee to bail in an action for money had and received, the Court discharged the assignee upon filing common bail. *Chambers* v. *Bernasconi and Another.* 498

5. An execution on a final judgment, following a judgment by *nil dicit*, held to be within the proviso of *s.* 108. 6 *G.* 4. *c.* 16., although there was no concert between the parties, and the judgment was obtained before the act came into operation. *Cuming and Another, Assignees of Heale, a Bankrupt*, v. *Welsford and Others.* *Page* 502

6. Under 6 *G.* 4. *c.* 16. *s.* 5. an act of bankruptcy by lying in prison twenty-one days, does not relate to the first day of imprisonment. *Moser and Another, Assignees, &c.* v. *Newman and Boole* 556

7. Where the Defendant obtained his certificate as a bankrupt after issue, and before judgment, the Court refused, after judgment, to enter an *exoneretur* on the bail-piece. *Humphreys* v. *Knight.* 569

8. A bankrupt, who obtained his certificate after issue, and before judgment, having, after judgment, been rendered in discharge of his bail, was held entitled to be liberated on a summary application, although he had not pleaded his certificate *puis darrein continuance. Same case.* 572

9. The proceedings under a commission of bankruptcy sued out in 1822, were not enrolled till after the repeal of the 5 *G.* 2. *c.* 30. in 1825: Held, that they were not admissible in evidence, the 6 *G.* 4. *c.* 16. not applying to the enrolment of proceedings under commissions anterior to the act. *Kay, Assignee of Sherwin*, v. *Goodwin.* 576

10. After a secret act of bankruptcy by

by *P.*, Defendant accepted a bill of exchange for him for 98*l.* at three months, which *P.* paid to a creditor standing by: later, in the course of the same day, *P.* agreed to sell Defendant four horses as security for 70*l.* of the 98*l.* The horses were subsequently delivered to the Defendant, who paid the 98*l.* bill when it became due: Held, that the transaction was not protected by the eighty-second section of 6 G. 4. *c.* 16. *Carter, Assignee of Peer, a Bankrupt*, v. *Breton.* *Page* 617

11. A right of entry vested in husband and wife in right of the wife, passes to the assignees of the husband if he become bankrupt. *Mitchell and Wife and Others* v. *Lady B. Hughes.* 689

12. A ship-broker is, as such, liable to be made a bankrupt. *Pott* v. *Turner and Another.* 702

13. A purchaser of property under a commission of bankrupt which is afterwards superseded by a creditor, is not protected by *s.* 87. of 6 *G.* 4. *c.* 16. from a claim at the suit of the assignees under a subsequent commission. *Gould, Assignee of Serjeant, Bankrupt*, v. *Shoyer.* 738

BILL OF EXCEPTIONS.

See PRACTICE, 14.

BILL OF EXCHANGE.

See PLEADING, 12.

The drawer of a dishonoured bill is entitled to notice of dishonour, although he knows the bill will not be paid by the acceptor, provided he has reason to expect it will be paid by any other person, or has a remedy over against such person. *Lafitte* v. *Slatter.* *Page* 623

A bill void under the stock-jobbing act is available in the hands of a *bond fide* holder without notice. *Day* v. *Stuart.* 108

BOTTOMRY.

The master of a brig bound himself and the brig for the repayment of money borrowed to repair her in a foreign port, with 12 per cent. bottomry premium, eight days after his arrival in *London.*

The lender effected an insurance on the risk, and in the policy described his interest to be on bottomry:

Held, that this was not bottomry, and that the misdescription was fatal. *Simonds & Loder* v. *Hodgson.* 114

BREACHES, ASSIGNMENT OF.

See ANNUITY.

CARRIER.

1. Plaintiff put on board defendant's barge, lime, to be conveyed from the *Medway* to *London:*

The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the

the barge taking fire thereby, the whole was lost:

Held, that the defendant was liable, and the cause of loss sufficiently proximate to entitle plaintiff to recover under a declaration alleging the defendant's undertaking to carry the lime without unnecessary deviation, and averring a loss by unnecessary deviation. *Davis* v. *Garrett.* *Page* 716

2. Plaintiff received a parcel from *G.* to book for *London* at the office of defendants, common carriers. Plaintiff, instead of obeying his instructions, put the parcel into his bag, intending to take it to *London* himself. The defendants having lost the bag, Held, that the plaintiff could not recover damages from them in respect of the parcel. *Miles* v. *Cattle and Another.* 743

CERTIFICATE.

See BANKRUPT, 8.

CLERK OF PEACE.

The appointment to the office of clerk of the peace is in the *custos rotulorum* of each county, and *King's County* in *Ireland* is not an exception. *Bayley* J. *diss.* *Harding* v. *Pollock and Another.* 25

COGNOVIT.

In an action on the case, Defendant gave a *cognovit* for 200*l.*, with a defeasance conditioned for the performance of various matters by a given time, and performed the matters (in part at least) within two months after the time stipulated. Plaintiff having issued execution on the *cognovit*, the Court referred it to the prothonotary, to see how much, if any thing, ought to be paid to the Plaintiff. *Charrington* v. *Laing.* *Page* 242

2. One of two who had been partners, having, after the partnership was dissolved, given, in an action against the two, a *cognovit* for debt and costs as between attorney and client, without the knowledge of his Co-defendant, the Court set the judgment aside. *Rathbone* v. *J. & D. Drakeford.* 375

CONDITION PRECEDENT.

See ACCORD AND SATISFACTION.

COSTS.

See PRACTICE, 1. ATTORNEY, 3.

1. Defendant was arrested for 327*l.*; he tendered 250*l.*, but did not pay it into court. An arbitrator, to whom the cause was referred, awarded the Plaintiff only 250*l.*: Held, not a case to entitle Defendant to costs for a malicious and vexatious arrest. *Sherwood* v. *Tayler.* 280

2. One of several Defendants in an action of debt, having pleaded bankruptcy, Plaintiff entered a *nolle prosequi* as to him: Held, that such Defendant was not entitled to his costs under 8 *Eliz. c.* 2. although before plea the Plaintiff

was

was apprised of the bankruptcy. *Booth and Another* v. *Middlecoat and Others.* *Page* 445.

3. *D.* having given a *cognovit* for 357*l.*, mortgaged certain premises as a security for the payment of that sum, and the costs of the judgment, and all other costs and charges whatsoever attending the same.

The mortgagee having levied execution, her right to the goods seized was disputed in an action at the suit of certain persons, who claimed to be assignees of *D.* under a bankruptcy. The mortgagee failed upon a first trial, but succeeded in a second, *D.* proving not to be bankrupt:

Held that the mortgagee could not claim from *D.* the costs of this action, as costs or charges attending the judgment confessed by *D.*

2. *D.* having stated at the execution that certain goods levied were not his property, and the sheriff having, by inquisition, ascertained that they were, the mortgagee was holden entitled to claim of *D.* the costs of the inquisition, if she had paid them to the sheriff. *Doe d. Holt and Others* v. *Roe.* 447

4. Defendant having been arrested for 1123*l.*, when the plaintiffs had the means of knowing that only 715*l.* was due, was held intitled to his costs under 43 G. 3. c. 46., although the accounts between Plaintiff and Defendant were somewhat complex. *Forster and Another* v. *Weston.* 527

5. In an action on the case for a malicious prosecution, *per quod* plaintiff was falsely imprisoned, one of several defendants obtaining a verdict, is not entitled to his costs under 8 & 9 W. 3. c. 11. if a verdict pass against the others. *Murray* v. *Nichols and Others.* *Page* 530

6. Where there are several Defendants who obtain a verdict generally, the costs of all must be taxed at the same time although they defend separately. *Smith and Others, Assignees of Cook,* v. *Campbell and Others.* 637

COVENANT.

1. A covenant with a lessor of premises in a parish, to indemnify the parish against any paupers which the covenantor may settle in it, is valid. *Walsh, Bart., and Another Executors of Sir H. Strachey,* v. *Fussell.* 163

2. A covenant not to sue upon a bond during the life of the obligor, and that if any person to whom the obligee should assign the bond should recover the principal, the obligee would pay the obligor, during his life, interest on the amount recovered: Held, no bar to an action by an assignee of the bond in the name of the obligee. *Morley* v. *Frear.* 547

3. Where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor, and the owners of the other two thirds, for pulling down an old smelting mill, and building another of larger dimensions,

mensions, upon a waste near the mines, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it: Held, that such a covenant was to be implied, and that the lessor of the one third might sue upon it in respect of his interest.

The lease contained a demise of all mines and minerals then opened or discovered, or which might during the term be opened or discovered, in or under certain moors and waste lands; and also all smelting mills then standing upon the said lands, with full liberty to sink shafts there, and to build thereon any mills or other bulidings requisite for working the mines, *habendum* the said demised premises, with the appurtenances for twenty-one years. The lessor afterwards granted his reversion of and in the said demised premises, with the appurtenances, to *G.B.* who, by will, devised the same to the Plaintiffs: Held, that the covenant to build the new smelting mill tended to the support and maintenance of the thing demised, and that the assignee of the reversion might therefore sue upon it. *Easterby* v. *Sampson and Another.* *Page* 645

4. Tenant for life, remainder over, by indenture demises to lessee, his executors, &c., for fifteen years, without any express covenant for quiet enjoyment; lessee is evicted by remainder-man after death of tenant for life, and before expiration of the fifteen years: Held, that lessee cannot maintain covenant against executor of tenant for life. *Adams* v. *Gibney and Others.* *Page* 656

DAMAGES.

See ASSUMPSIT, 1.

DEED.

1. By an agreement between Defendants and their creditors, all Defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors, and Defendants were to execute to the trustees a conveyance of all their estate, in which deed were to be inserted all other usual clauses. The trustees carried on Defendants' business, and paid the creditors 10*s.* in the pound; they then tendered for execution by Defendants a conveyance of all their estate, containing a clause of release, which the Defendants objected to as insufficient, and refused to execute the conveyance: the instrument not having been executed by all the creditors, a meeting at which the Defendants were called on to execute was adjourned, that the signature of every creditor might be obtained:

Held, that Plaintiffs, who, as creditors, were parties to the above agreement, could not sue for their original debt, at least till the conveyance, such as it was, had been executed by all the

the creditors, and refused by the Defendants. *Tatlock and Others* v. *Smith and Others.* *Page* 339

2. Defendant drew bills, as surety, for the acceptor, *C. H.*, and it was provided by a deed, to which Plaintiff, the holder of the bills, as well as the Defendant, was a party, that he should not sue Defendant on the bills till *C. H.*'s effects should have been sold, and the proceeds applied in discharge of the bills.

C. H.'s effects were seized, and sold under a commission of bankruptcy, the trustee to whom they had been conveyed by the deed in question having, with the knowledge and assent of the Defendant, omitted to take possession of them in time:

Held, that the Plaintiff was not barred from suing the Defendant on the bills. *Lancaster and Another* v. *Harrison.* 726

DEMISE.

See LANDLORD AND TENANT, 2.

DEVISE.

1. Devise of testator's freehold messuages, stock in the funds, money and debts, and all shares or *property* which he might be possessed of or entitled to, to trustees and their executors, in trust for testator's wife and children, &c.

Codicil devising testator's copyhold to his wife till the expiration of certain leases, and after that to be sold, and the money to be placed in the funds for the benefit of testator's children, as directed in the will:

Held, that the trustees took no interest in the copyhold, and that the wife's interest terminated on the expiration of the leases. *Chapman* v. *Prickett.* 602

2. Testator, after bequeathing pecuniary legacies to his children, devised to his widow the *whole of his remaining property* in the Bank of *England* or otherwise, and also a freehold house in *S.*, a freehold estate in *R.*, a copyhold estate in *B.*, and a leasehold estate in *A.*, with all right and title to the same: Held, that the widow took a fee in the freehold, and a customary fee in the copyhold. *Sharp* v. *Sharp.* *Page* 630

DISCHARGE.

See INSOLVENT, 2.

DISTRESS.

See LANDLORD AND TENANT, 1. 7.

DOWER.

Adultery is a bar to dower, although committed after the husband and wife have separated by mutual consent. *Hethrington* v. *Graham.* 135

EJECTMENT.

See PRACTICE, 13. 23.

1. In favour of a defendant in ejectment who shewed no title to the premises

premises sought to be recovered, the Court would not presume a surrender of a mortgage term to the owner of the inheritance from the circumstance, that in 1802 the Court of Chancery had decreed a sale of the mortgaged property for the payment of the money borrowed, and that some sales had taken place under the decree: But the defendant had not purchased the land in question under the decree, and there was no evidence of any further proceedings in chancery. *Doe dem. Hammond and Others* v. *Cooke and Another.* *Page* 174

2. Notice to a weekly tenant to quit at the end of his tenancy next after a week from the date of the notice, sufficient. *Doe d. Campbell* v. *Scott.* 362

EVIDENCE.

See PLEADING, 7. LIBEL, 2.

1. One who admits he is liable in respect of a claim on which an action is brought, is nevertheless incompetent to be a witness in the action; for though contribution in respect of the claim advanced be ultimately against his interest, he has a stronger immediate interest to defeat the action or lessen the damages. *Hall* v. *Rex.* 181

2. In an action on the case for a malicious prosecution, the Plaintiff is to give *primâ facie* evidence of want of probable cause, which the Defendant may rebut, if he can, by shewing the existence of probable cause.

Defendant presented two bills for perjury against the Plaintiff, but did not appear himself before the grand jury, and the bills were ignored.

He presented a third, and on his own testimony the bill was found. This prosecution he kept suspended for three years, till Plaintiff, taking the record down to trial, and Defendant declining to appear as a witness, although in court, and called on, Plaintiff was acquitted:

Held, sufficient *primâ facie* evidence of want of probable cause. *Willans* v. *Taylor.* *Page* 183

3. An ancient statement concerning the payment of the tithes of a parish by a modus, signed by the rector for the time being, is evidence against a succeeding rector as an admission by his predecessor, although found among the title deeds of a land-owner in the parish, and not in the bishop's registry. *Maddison* v. *Nuttall.* 226

4. 1. In an action by the assignee of an insolvent, it is not necessary to prove his petition to the Insolvent Debtors' Court, as part of the assignee's title.

2. The insolvent is an incompetent witness for the assignee, although he be willing to release the surplus of his effects. *Delafield, Assignee of David Jones, an Insolvent,* v. *Freeman.* 294

5. Defendants, *A.* and *B.*, were sued on a bill of exchange accepted by them while in partnership, *B.* pleaded bankruptcy and certificate, and the Plaintiff entered a *nol. pros.* as to him.

Having

Having released his surplus effects, Held, he was a competent witness for *A. Affalo* v. *Fourdrinier.* *Page* 306

6. After the plaintiff has proved, by witnesses, a case of implied or oral contract, he cannot be nonsuited by the Defendant's producing an unstamped written instrument purporting to contain the terms of the contract. *Fielder* v. *Ray.* 332

7. A remainder-man after a tenant in tail is not a competent witness for the tenant in tail, in ejectment for the entailed property. *Doe d. Lord Teynham* v. *Tyler.* 390

8. The Court will not take judicial notice of the sheriff's book. *Russell* v. *Dickson.* 442

9. Plaintiff's witness proved an acknowledgment by the Defendant, that he held under *T.*, and stated that he, witness, had drawn an agreement touching the premises between Plaintiff and *T.*:

Held, that Plaintiff was bound to produce the writing. *Fenn d. T. Thomas* v. *Griffith and Another.* 533

10. In a suit touching the validity of a parish rate, the Plaintiff is entitled to inspect the parish books without paying any costs. *Newell* v. *Simpkin and Others.* 565

11. Plaintiff declared on an agreement to employ him at the end of a year.

Defendant pleaded the general issue, and that there was no memorandum in writing of the agreement, as required by the statute of frauds. Plaintiff replied, that there was such a writing:

Held, he was bound to permit an inspection of it by Defendant, although it consisted only of a letter from Defendant's agent. *Blogg* v. *Kent.* *Page* 614

12. Where a witness remains in court after an order for witnesses on both sides to withdraw, it rests in the discretion of the Judge, whether such witness shall be heard; except in the exchequer, where he is peremptorily excluded. *Parker* v. *M'William.* 683

EXECUTION.

See LANDLORD AND TENANT, 4.

A Sheriff's officer, at the request of *U.*, against whom he had to execute a *fi. fa.*, continued in possession of the effects levied, and carried on the business of a farm for *U.* during three months; an action was then brought by the sheriff, and judgment obtained against a purchaser of *U.*'s crops, &c., upon which a balance remained in favour of U. after defraying the amount to be levied against *U.*, and the attendant expenses. The sheriff having in his return taken credit for the expenses in carrying on the farm, and having afterwards, by letter, admitted the sum recovered from the purchaser of the crops, without repudiating the conduct of the officer: Held, that he, and not his officer, was liable for the balance to *U.*, notwithstanding the officer had managed the farm at *U.*'s request. *Underhill* v. *Sir T. Wilson, Bart.* 697

FINE AND RECOVERY.

1. Fine permitted to pass as of a term twenty-two years previous, upon payment of the king's silver, all surviving parties interested consenting, upon its being shewn, that, unknown to the parties, the clerk instructed to pass it had absconded with money intrusted to him for payment of the king's silver, when that payment alone was wanting to complete the fine. *Ash and Wife and Watts*, Connusors; *Gye*, Connusee. *Page* 275
2. Scotch fine. *Hack's* Fine. 353

FIXTURES.

See LANDLORD AND TENANT, 3.

FRAUDS, STATUTE OF.

1. The Plaintiff, an occupier of land, at the request of the Defendant, and upon a promise of indemnity, resisted a suit of the vicar for tithes: Held, that this was not a promise required by the statute of frauds to be in writing.
2. The vicar having succeeded in the suit, Plaintiff's attorney paid the vicar the costs recovered from the Plaintiff. The Plaintiff gave his attorney a promissory note for the amount, and before the promissory note became due, sued the Defendant: Held to be sufficient proof of an allegation that the Plaintiff had paid the vicar's costs. *Adams* v. *Dansey*. 506

FREIGHT.

The Plaintiff, by charter-party, agreed with *G.* to convey corn at 4*s.* 6*d.* a quarter. *G.* made a sub-charter with *S.*, who consigned corn to the Defendants under the bills of lading, by which they were to pay 6*s.* a quarter freight, and gave them notice to retain 1*s.* 6*d.* a quarter for him:

The Plaintiff having sued for freight at 6*s.* a quarter: Held, he was entitled to recover only 4*s.* 6*d.* *Mitchenson* v. *Begbie and Others*. *Page* 190

GUARANTY.

In *April* 1825, Defendant guaranteed the payment of money due from his son to the plaintiff upon a sale of timber. The Plaintiff received part payment of the son, and made repeated unsuccessful applications to him for the residue till *December* 1827, when the son became bankrupt. The Plaintiff never disclosed to the Defendant the issue of these applications, but in *December* 1827 sued him on his guaranty: Held, that the defendant was not discharged by the time that had elapsed, nor by want of notice of the applications made to his son. *Goring* v. *Edmonds*. 94

2. "I agree to be security to you for *J. C.* late in the employ of *J. P.* for whatever you may entrust him with while in your employ, to the amount of 50*l.*:"

Held,

Held, that the consideration for the guaranty sufficiently appeared. *Newbury* v. *Armstrong*. *Page* 201

3. "I do hereby agree to guarantee the payment of goods to be delivered in umbrellas and parasols to *J.* and *E. A. S.*, according to the custom of their trading with you, in the sum of 200*l*." Held, a continuing guaranty. *Hargreave* v. *Smee*. 244

4. "I hereby agree to be answerable to *K.* for the amount of five sacks of flour, to be delivered to *T.*, payable in one month.

Nov. 18. *T. G.*"

Held to be a guaranty for flour, not exceeding five sacks delivered at one time, and not a continuing guaranty for parcels delivered at various subsequent periods, though not exceeding in the whole five sacks. *Kay* v. *Groves*. 276

INDEMNITY.

See PRACTICE, 18.

INSOLVENT.

See EVIDENCE, 4. TRESPASS, 1. PRACTICE, 15.

1. A payment by an insolvent to a creditor within three months before the insolvent's imprisonment, is void under 7 *G.* 4. *c.* 57. § 32., although the word *pay* is not employed in that section. *Herbert, Assignee of Knight*, v. *Wilcox*. 208

2. An insolvent is not exonerated from damages unascertained at the time of his discharge, although the action in which they are sought to be recovered was commenced, and judgment by default suffered prior to his first imprisonment. *Wilmer* v. *White*. *Page* 291

3. A warrant of attorney given to a particular creditor by one who at the time intends to take the benefit of the insolvent debtors' act, is a charge on property or a transfer of it by assignment within the thirty-second section of 7 *G.* 4. *c.* 57. *Sharpe and Another, Assignees of Harris an Insolvent*, v. *Thomas*. 416

4. The sixteenth section of the 7 *G.* 4. *c.* 57., which declares that it shall be lawful for the provisional assignee of the Insolvent Debtors' Court to sue in his own name for the effects of insolvents, if the Court shall so order, is only affirmative of the provisional assignee's right, and he may sue with or without such order. *Dance, provisional Assignee of Shepherd, an Insolvent*, v. *Wyatt*. 486

5. A prisoner in custody for debts exceeding 300*l*. is liable to be brought up under the compulsory clause of the Lords' act. *Womersley* v. *Bousfield*. 801

INTEREST.

Defendants bound themselves by deed to pay 1500*l*. to be delivered to *R. D.* in goods, by three payments of 500*l*. each, at three, five, and seven months: Held, that the instrument did not carry interest. *Foster and others* v. *Weston*. 709

JOINT

JOINT STOCK COMPANY.

A prospectus was issued for a distillery company with a capital of 600,000*l.* and 12,000 shares, and to be conducted pursuant to the terms of a deed to be drawn up. All persons who did not execute the deed, within 30 days after it was ready, were to forfeit all interest in the concern. No more than 7,500 shares were ever allotted; only 2,300 persons paid the first deposit; only 1,106 the second, and only 65 signed the deed; and the directors, after the time for paying the second instalment had elapsed, advertised that persons who had omitted to pay had forfeited their interest in the concern.

Held, that an application for shares, and payment of the first deposit, did not constitute a partner one who had not otherwise interfered in the concern, and that the insertion of his name by the secretary of the company in a book containing a list of subscribers, was not a holding out as partner. *Fox* v. *Clifton and Others.* 776

JUDGMENT.

See PRACTICE, 17.

LANDLORD AND TENANT.

1. It was stated in a special verdict, that by an indenture, *A.* demised to *B.* all that wharf next the river *Thames* described by abutments, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the said wharf belonging; and that by the indenture the exclusive use of the land of the river *Thames* opposite to and in front of the wharf, between high and low water mark, as well when covered with water, as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but that the land itself between high and low water mark was not demised:

Held, that the lessor could not distrain, for rent in arrear, barges, the property of *B.*, lying in the space between high and low water mark, and attached to the wharf by ropes. *Capel and Another* v. *Buszard and Others, Assignees of Jones and Another, Bankrupts,* *Page* 150

2. 1. Agreement for a lease, with stipulation for the lessee to commence with laying out a considerable sum on the premises, (the lease to contain certain specified covenants,) "and in the mean time, and until such lease shall be executed, to pay rent, and to hold the same premises, subject to the covenants above mentioned:"

Held, to amount to an actual demise.

2. Use and occupation lies for constructive as well as actual occupation. *Pinero, one, &c.* v. *Judson and Another.* 206

3. A pump erected by a tenant

during his term, and slightly affixed to the freehold, is removable as a tenant's fixture. *Grymes* v. *Boweren*. *Page* 437

4. A landlord, who seizes his tenant's goods under an execution, the proceeds of which he is obliged to refund to the assignees of the tenant under 7 *G.* 4. *c.* 57. *s.* 34. cannot retain against the assignees the amount of a year's rent under the 8 *Ann. c.* 14. *s.* 1. *Taylor and Another, Assignees etc.* v. *Lanyon*. 536

5. 1. Where the lessor of the Plaintiff, upon affidavit that a tenancy under a written instrument has been duly determined, moves that the Defendant may give security for costs, a subsequent retaking, if an answer to the motion, must be alleged with particularity and precision.

2. A notice on the 28th of *September*, to quit on the ensuing 25th of *March*, is a sufficient half-year's notice to quit. *Roe d. Durant* v. *Doe*. 574

6. A mortgagee is not permitted, under 11 *G.* 2. *c.* 19., to come in and defend as landlord in ejectment, unless he be interested in the result of the suit. *Doe d. Pearson* v. *Roe*. 613

7. Plaintiff being about to take an apartment of Defendant's tenant, Defendant promised Plaintiff never to trouble him or his property so long as he paid the tenant the rent of the apartment.

The Plaintiff paid the rent up to a certain period, and had made a tender of the residue remaining due, when the Defendant, who had received no notice of the tender, distrained Plaintiff's goods for rent due from the tenant to Defendant:

Held, that his right to distrain was not barred. *Welsh* v. *Rose*. *Page* 638

LIBEL.

1. 1. A statement in a newspaper of the circumstances of a cause tried in a court of justice, given as from the mouth of counsel, instead of being accompanied or corrected by the evidence, is not such a report of the proceedings of a court of justice, as a newspaper is privileged to publish.

2. In mitigation of damages, the Defendant was allowed under the general issue to shew that he copied this statement from another newspaper, but was not allowed to shew that it had appeared concurrently in several other newspapers. *Saunders* v. *Mills*. 213

2. 1. It is a libel to publish in a newspaper a story of an individual calculated to render him ludicrous, although he may have told the same story of himself.

2. Proof that the Defendant accounted for the stamp-duties of the paper in question, is proof of publication. *Cook* v. *Ward*. 409

3. 1. The declaration alleged, that the Plaintiff had been appointed as surveyor of a company or society, called "The New *England* Company;" and had been employed by them as such: and that Defendant libelled him in his employment:

Held,

Held, that it was not necessary to allege, with extreme precision, the description of the company, or to prove the Plaintiff's appointment, the libel being alleged of the Plaintiff in his employment.

2. The libel charged Plaintiff with being the most artful scoundrel that ever existed, and with being insolvent; but the writer added, that he had never disclosed the matter, nor ever would, except to the person whom he addressed and his friend. This latter assertion was omitted in the declaration:

Held, that the omission was not material. *Rutherford* v. *Evans.* *Page* 451

4. 1. Defendant being a competitor with Plaintiffs for a contract with the navy board for *African* timber, the Plaintiffs obtained the contract; the Defendant then agreed to supply the Plaintiffs with a portion of the timber, and made no objection to taking their bills in payment; this agreement, however, having been rescinded on a disagreement as to the terms, the Defendant wrote to a merchant at *Sierra Leone*, who was to supply the timber in question, and of whom the Defendant was a creditor and the sole correspondent in *London*, a letter, reflecting deeply on Plaintiffs' mercantile character, and putting the merchant on his guard against them, for which, as a libel, the Plaintiffs brought an action. The jury having found for the Defendant, the Court granted a new trial.

2. The transmission of the letter by Defendant to his correspondent held a sufficient publication by Defendant. *Ward and Another* v. *Smith.* *Page* 749

LIMITATION OF ACTION.

By the *Brighton* improvement act, actions for any injury done by the commissioners under the act, are to be brought within six months after *the thing done.*

The Defendants, proceeding under that act to dig a sewer, cracked the walls of the Plaintiffs house:

Held, that the Plaintiff's right of action was limited to six months after the day on which the crack was occasioned, and did not continue for as long a time as the crack continued. *Lloyd* v. *Wigney and Others.* 489

LIMITATIONS, STATUTE OF.

1. Plaintiff sued in *Hilary* term, 1829, on a debt which accrued more than six years before: Held, that the 9 *G.* 4. *c.* 14., which came into operation on the 1st *January* 1829, precluded him from recovering on an oral promise to pay the debt, made by defendant in *February* 1828. *Towler* v. *Chatterton.* 258

2. "Plaintiff's claim, with that of others, shall receive that attention that, as an honourable man, I consider them to deserve, and it is my intention to pay them; but I must be allowed time to arrange my affairs, and if I am proceeded against, any exertion of mine will be rendered abortive:"

Held, not an unqualified acknowledgment from which the court could imply a sufficient promise to pay to take a case out of the statute of limitations. *Fearn* v. *Lewis.* *Page* 349

LIQUIDATED DAMAGES.

See COGNOVIT, 1.

Liquidated damages cannot be reserved on an agreement containing various stipulations, of various degrees of importance, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined. *Kemble* v. *Farren.* 141

MAGISTRATES.

Defendant, as a magistrate, committed to prison as a felon, the plaintiff, against whom a charge had been made of maliciously cutting down a tree on premises in his occupation, the property of *A. B.*: Held, that defendant was not liable to an action. *Mills* v. *Collett, Clerk.* 85

MEMORANDA.

Pages 200. 348. 481. 802.

MODUS.

See EVIDENCE, 3.

MORTGAGE.

See COSTS, 3. LANDLORD & TENANT, 5.

NEW TRIAL.

The Court will not grant a new trial on the ground that evidence has been admitted which ought to have been rejected, if, exclusive of such evidence, there be enough to warrant the finding of the jury. *Doe. d. Lord Teynham* v. *Tyler.* *Page* 561

2. The plaintiff having been nonsuited in consequence of the accidental absence of a witness whom he had *subpœnaed*, the Court set aside the nonsuit, and granted a new trial, on payment of costs; although it was objected, that, the nonsuit not having been occasioned by any misconduct on the part of the Defendant, he was entitled to retain his judgment. *Shillito* v. *Theed.* 753

NOTICE TO QUIT.

See EJECTMENT, 2.

OUTSTANDING TERM.

See EJECTMENT, 1.

PLEADING.

See ANNUITY 1. LIBEL, 3, PRACTICE, 20. CARRIER, 1.

1. Where a verdict was taken by consent on two counts, the Court, on the application of the Plaintiff, amended the postea, by entering the verdict on one, (to which the evidence applied,) although the Judge

Judge who presided at the trial declined to interfere. *Henly* v. *the Mayor and Corporation of Lyme Regis.* *Page* 100

2. Avowry for rent due from Plaintiff, as tenant of premises to avowant, under a demise before then made, at the yearly rent of 170*l.*:

Held, not supported by proof of a conveyance to avowant, to which three trustees, the lessors, were parties, but which was executed by only two of them. *Philpott* v. *Dobbinson.* 104

3. It is a fatal variance to describe a bond, conditioned for payment by *A.*, *B.*, and *C.*, as a bond conditioned for payment by *A.*, *B.*, and *D.*, although the bond be several as well as joint, and the action be brought against *A.* severally. *Adams and Others* v. *Bateson.* 110.

4. The Court will not allow a party to plead in *assumpsit* matter which may be given in evidence under the general issue, unless the plea be simple, and not likely to perplex the Plaintiff. *Hammond* v. *Teague.* 197.

5. An assistant overseer, appointed under the 59 G. 3. c. 12., and having, by virtue of his office, the poor rate in his custody, is liable to a penalty for refusing to produce it to an inhabitant when lawfully demanded, according to the 17 G. 2. c. 3.

2. The declaration alleged that Defendant was assistant overseer; that a rate for the relief of the poor was made and duly allowed: and although Defendant, as such assistant overseer, had the rate in his possession, and although Plaintiff, at a reasonable time, demanded an inspection of it, and tendered 1*s.*, yet Defendant refused to produce it, whereby he forfeited 20*l.*:

Held, on motion in arrest of judgment, that the count was sufficient; for if the Defendant had the rate in his custody *as* assistant overseer, it might be presumed that it was his duty to produce it when lawfully demanded. *Edwards* v. *Bennett.* 230

6. Libel. Defendant published that Plaintiff, a proctor, had been suspended three times, *per quod* his neighbours were led to think he had been guilty of extortion. Plea, that he had been suspended once for extortion: Held ill. *Clarkson* v. *Lawson.* 266

7. Declaration, that Plaintiff, at the request of Defendant, and upon Defendant's undertaking to indemnify, defended an action for the recovery of money in which Defendant claimed an interest; that judgment was given against Plaintiff for 42*l.*; and that he was imprisoned, and paid the money under a *ca. sa.*:

Held, that he might recover against defendant this sum under this count, upon proof of the judgment, without proof of the *capias:* or even on a count for money paid to Defendant's use; the Defendant having taken out a summons to be permitted to pay such sum in discharge of Plaintiff's demand. Held, also, that the above special count did

not disclose a contract void on account of maintenance. *Williamson* v. *Henley.* *Page* 299

8. Defendant took Plaintiff by mistake, under a bail recognizance, entered into by a person of the same name, and upon discovering the mistake, discharged him after some little delay; Defendant having then pleaded the recognizance in bar to an action of trespass brought by the Plaintiff for the imprisonment, the Court refused to strike out the plea. *M'Crandle* v. *Berwise and Another* 429

9. Defendant told *J. P.* that certain oranges of *J. P.*'s would not have sold so ill if Plaintiff had not, before the sale, propagated a report that *there were* three or four cargoes of oranges then coming to market; whereupon *J. P.* discontinued employing the Plaintiff as he had before been wont:

Plaintiff thereupon sued Defendant for injuring him, by stating that Plaintiff had caused the loss on *J. P.*'s oranges, by propagating a report that *he* (*Plaintiff*) *had* three or four cargoes of oranges coming to market:

Held a fatal variance. *Wood* v. *Adam.* 481

10. Trespass for breaking a close called *Lord's Leys.* Plea, right on *Brockeridge Common*, and that *Lord's Leys* was part of the common. Replication, no right on *Lord's Leys.*

At the trial, Plaintiff admitted that Defendant had a right on all *Brockeridge Common* except the portion called *Lord's Leys*, and Defendant admitted he had no evidence of any exercise of the right on *Lord's Leys*:

Held, that upon these pleadings and admissions, Plaintiff was entitled to judgment. *Maxwell* v. *Martin.* *Page* 522

11. Declaration, that Defendant had libelled Plaintiff, a proctor, by publishing that he had been suspended three times.

Plea, as to one of the said suspensions, that plaintiff had been once suspended by Sir *J. N.*

Held, that the libellous matter was thus divisible, and the plea an answer as to part. *Clarkson* v. *Lawson.* 587

12. Averment, that Defendant accepted a bill, sufficient on special demurrer, although the statute 1 & 2 Geo. 4. requires an acceptance in writing. *Chalié and Another* v. *Belshaw.* 529

13. A general plea of bankruptcy under the statute, ought to pursue the terms of the statute, and conclude to the country. *Sheen* v. *Garrett.* 686

POSTEA.

1. Plaintiffs, as owners of messuages in a chapelry, alleged a right to appoint a curate in virtue of their being charged annually for the repair of the chapel.

The proof being, that the chapel was repaired out of the poor-rate, Held, that the allegation was not sustained.

2. Where the point is reserved at the trial, a nonsuit may be entered on issues found for the Plaintiff, notwithstanding there be issues on the same record found for the Defendant.

Defendant. *Shepherd and Others* v. *Bishop of Chester and Others.* *Page* 435

POWER.

Where *A. B.*, seised in fee of one moiety of certain premises in the county of *S.*, and tenant for life, with power of appointment by deed or will, of the other moiety, devised as follows: —

"I will give and devise all my freehold estates in *L.* and county of *S.*, or elsewhere, to my nephew *J. R.* for life, on condition that, out of the rents thereof, he do from time to time keep such estates in repair;"— Held, that this did not operate as an execution of the power, but passed that moiety only of which testator was seised in fee. *Denn dem. Nowell* v. *Roake.* 475

PRACTICE.

See PLEADING, 1. 8. EXECUTION. BAIL, 5. VENUE.

1. Where a rule for judgment, as in case of a nonsuit, is discharged upon a peremptory undertaking, costs incurred at the sittings, in consequence of notice of trial, are not allowed, unless mentioned in the rule. *Partington* v. *Wyatt*, 171
2. Service of a writ directed to the chamberlain of *Chester* is irregular without his mandate to the sheriff. *Earl of Shrewsbury* v. *Haycroft.* 194
3. Members of a corporation may be bail in error for the corporation. *Henley* v. *Mayor and Burgesses of Lyme Regis.* 195
4. Where an affidavit is sworn by two deponents, the names of both must be specified in the jurat. *Houlden* v. *Fasson.* *Page* 236
5. A new rule to plead must be given after amendment of the declaration, although the amendment be on payment of costs. *Addis* v. *Thomas.* 236
6. Where the Defendant died before the application, the Court refused to amend a *fi. fa.* by inserting the *testatum* clause. *Phillips* v. *Tanner.* 237
7. Affidavit "that Defendant was indebted to Plaintiff on a bill drawn by *M. D.* upon and accepted by Defendant and indorsed by *M. D.* to Plaintiff" (without saying that the bill was drawn payable to order): Held sufficient to hold Defendant to bail. *Hughes* v. *Brett.* 239
8. Where added bail are, upon a discovery made subsequently to their allowance, rejected by the Court, the bail below (their names remaining on the recognizance) are, before the rejection of the bail above, competent to render the Defendant. *Rex* v. *The Sheriff of Middlesex* (in the cause of *Logan* v. *Louel*). 251
9. The process in *quare impedit* is by summons, attachment, and great distress; therefore, where Plaintiff proceeded by summons, to which *nihil* was returned; then by attachment, which recited that the Defendant had been summoned; and then by *distringas*, under which the sheriff was ordered to levy 48*l.*; the proceedings were held to be irregular. *Sir J. Tyrell, Bart.* v. *J. T. Jenner,*

ner, sued with the late Archbishop of Canterbury. *Page* 283

10. The Plaintiff, in an action against the accepter of a bill of exchange, being called on by rule to deliver up the bill on payment of debt and costs, was, by delivery of the instrument, holden to have complied with the rule, although he had rendered it a nullity by considerable erasures. *Tomlins* v. *Lawrence.* 376

11. Writ returnable the 3d of *November* instead of "the morrow of *All Souls*," quashed for irregularity. *Houlden* v. *Fasson.* 424

12. Return "next *after* fifteen days of *St. Hilary*," irregular. *Adcock* v. *Felton.* 441

13. The lessor of the Plaintiff having brought three ejectments in the Court of K. B. for the same property, that Court staid the proceedings in two, and compelled the Plaintiff to confine himself to one upon certain terms which rendered it probable that in the event he would have to pay the costs; whereupon he brought an ejectment for the same property in this Court. Proceedings therein were staid. *Doe dem. Carthew and Others* v. *Brenton.* 469

14. The Defendant sent the Plaintiff a copy of a bill of exceptions, in order to his concurring in the statement of facts, and, at the same time, sued out a writ of error: Held, that the Plaintiff had no right to retain the bill of exceptions, in order to frustrate it, on the ground that the Defendant had waived it by suing out a writ of error. *Willans* v. *Taylor.* 512

15. The decision of a judge of assize in remanding a prisoner under the Lords' act is final up to that time. *Briggs* v. *Sharp.* *Page* 517

16. Plaintiff had sued Defendant for negligence, *per quod* Plaintiff became liable to pay certain sums, and lost the custom of *A.*, *B.*, and *C.*

The cause was referred under an order of N. P., by which Plaintiff was precluded from bringing any new action. The arbitrator made an award in favour of Plaintiff, who nevertheless sued Defendant again, the new declaration differing from the old one, in stating that Plaintiff *had* paid the money he before alleged himself *liable* to pay, and had lost the custom of *D.*, *E.*, and *F.*:

Held that the Court could not stay proceedings on a summary application. *Dicas* v. *Jay.* 519

17. Demand of particulars of a notice of set off delivered after a plea which was a nullity: Held, no waiver of the Plaintiff's right to sign judgment. *Ford* v. *Bernard.* 534

18. The sheriff without previously requiring an indemnity, seised, under an execution issued by *A.* against *L.*, goods which were in the possession of Plaintiff under a bill of sale from *L.*, notwithstanding notice of the bill of sale. He then applied to *A.* and Plaintiff severally for an indemnity before proceeding further, but both refused, and the Plaintiff sued him in trespass for the seizure.

The Court staid the proceedings till an indemnity should have been

been given. *Beavan* v. *Dawson, Sheriff of Bedford.* *Page* 566

19. A cause in which there was no notice of set off having been referred by order of *nisi prius*, the judge, during the assizes, made a second order to enable the Defendant to give a particular of set off:

Held, that 1 *G.* 4. *c.* 55. did not authorise this second order. *Ashworth and Others* v. *Heathcote.* 596

20. A plea of privilege, after special imparlance, is ill on demurrer; but the Plaintiff cannot treat it as a nullity, and sign judgment. *Godefroy* v. *Jay.* 616

21. The sheriff may, even after he is in contempt for not bringing in the body, put in bail to surrender the Defendant without the consent of the Defendant, and notwithstanding the original bail-piece is still on the file. *Hamilton* v. *Jones and Others.* 628

22. When money is paid into the hands of the sheriff in lieu of bail, the Defendant has, under 7 & 8 *G.* 4. *c.* 71., till the day for *perfecting* special bail for giving notice of his intention that the money shall remain in court to abide the event of the suit. *Rowe* v. *Softly.* 634

23. Surety recognizance in ejectment pursuant to 1 *G.* 4. *c.* 87. how entitled. *Roe d. Durant* v. *Moore.* 656

PRIVILEGE.

The clerk of the treasury of the Court of Common Pleas is bound to a personal attendance on his duties, and therefore is not compellable to serve the office of overseer. *Ex parte Jefferies.* *Page* 195

PROCEDENDO.

Where a cause was removed from an inferior court after interlocutory judgment, and before enquiry, the Court refused to award a *procedendo*. *Godley* v. *Marsden.* 433

QUARE IMPEDIT.

See PRACTICE, 9.

RECOVERY.

Recovery allowed to pass, although the warrant of several vouchees was on separate pieces of parchment. *Sawbridge, Demandant; Jeyes, Tenant; Parsons and Others, Vouchers.* 426

REGULÆ GENERALES.

Pages 347, 348. 622. 802.

RELEASE.

See COVENANT, 1.

REPLEVIN.

See DEVISE, 1.

SHERIFF.

See PRACTICE, 18. EXECUTION.

SHIPBROKER.

See BANKRUPT, 12.

SIMONY.

The sale of a next presentation, the incumbent being *in extremis*, within the knowledge of both contracting parties, but without the privity or with a view to the nomination of the particular clerk, is not void on the ground of simony. *Fox* v. *The Bishop of Chester.* *Page* 1

STOCK-JOBBING.

See BILL OF EXCHANGE, 1.

SUNDAY.

See ASSUMPSIT, 2.

SUPERSEDEAS.

See BANKRUPT, 13.

TRESPASS.

See PLEADING, 10.

Plaintiff, a prisoner, assigned all his effects, under the insolvent debtors' act, *June* 17.; his wife continued to reside in his house, retaining some of the furniture. On the 9th *July*, the wife having been absent for two days, and no one being in the house, Defendant committed a trespass in an attempt to distrain for rent: Held, that the wife had not a sufficient possession to enable the Plaintiff to sue in trespass. *Topham* v. *Dent.* 515

TROVER.

See ATTORNEY, 1.

TRUSTEES.

See TURNPIKE.

TURNPIKE.

In an action against the clerk of the trustees of a turnpike road, under a statute which permits the trustees to sue and be sued in the name of their clerk, execution cannot issue against the clerk personally. *Wormwell* v. *Hailstone.* 668

USE AND OCCUPATION.

See LANDLORD AND TENANT, 2.

VARIANCE.

See PLEADING, 2, 3. 9. BOTTOMRY. LIBEL 3. POSTEA.

VENDOR AND PURCHASER.

By a deed of 1812, mortgagor assigned to mortgagee a policy of insurance; in a deed of 1813, between the same parties, upon a further advance, there was a power to sell the policy if the mortgage money were not paid on a given day; but upon a further advance in 1822, with conversion of unpaid interest into principal by a third deed, the power was omitted:

The mortgagee having afterwards advertised the policy for sale *under a power*, and the mortgagor having refused to concur in the conveyance.

conveyance. Held, that a purchaser was entitled to recover back the deposit money paid on the sale. *Curling* v. *Shuttleworth.* *Page* 121

VENUE.

The Court will not, in a transitory action, change the *venue* on account of the expense of trying the cause in the county where the *venue* is laid, unless the expence of trying it there greatly preponderates. *Alcock* v. *Cook.* 733

WATERCOURSE.

See ACTION ON THE CASE, 1.

WILL.

A will of lands subscribed by three witnesses in the presence and at the request of the testator is sufficiently attested within the statute of Frauds, although none of the witnesses saw the testator's signature, and only one of them knew what the paper was. *White* v. *Trustees of the British Museum.* *Page* 310

END OF VOL. VI.

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